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IN THE

Supreme Court of the United States

CLAYTON ANTHONY WALKER, Individually and as the Administrator of the Estate of Breanna Nicole Walker on behalf of Breanna Nicole Walker,

Petitioners,

v.

RUSS MUNSELL, Officer; DAVID HOOTER, Officer; RODNEY WALKER, Officer,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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There is a split in the circuits, to which the Fifth Circuit adheres to the minority position, on the issue of whether a conviction for resisting arrest, where there is no right of habeas corpus to challenge the constitutionality of the arrest bars a § 1983 action arising out of the same arrest pursuant to *Heck v. Humphrey*. Had the Petitioner herein been in another circuit, he would be allowed to proceed with his claim, despite the conviction; yet, because he is in the Fifth Circuit, the claim is barred.

QUESTIONS PRESENTED

I. Does a conviction of resisting arrest bar a 28 U.S.C. § 1983 excessive force claim arising out of the arrest under *Heck v. Humphrey*?

II. Where the Plaintiff was not sentenced to incarceration and has no legal basis to file a writ of habeas corpus, did the lower courts err in finding *Heck* applicable to the present § 1983 action?

III. Where the Defendants failed to affirmatively assert a *Heck* related defense in their *Answer*, was the *Heck* defense waived and did the lower courts err in allowing the Defendants to raise by motion a defense not pled in the answer?

IV. Did the district court err in failing to certify its ruling on the excessive force claim for appeal.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit filed June 13, 2008 may be found in Appendix "A." The order of the United States District Court for the Middle District of Louisiana dated January 11, 2008 may be found in Appendix "B."

JURISDICTION

The Judgment of the United States Fifth Circuit Court of Appeal was entered on June 13, 2008, (App. A). This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This Section 1983 action arises out of a November 3, 2006, traffic incident. Petitioners are seeking review by writ from this Court to clarify a split in the circuit courts regarding *Heck v. Humphrey*. The minority position taken by the Fifth Circuit is that *Heck* applies to excessive force cases involving a conviction for resisting arrest regardless of whether or not the plaintiff was or is incarcerated and whether or not the plaintiff has any other legal avenue (petition for habeas corpus) to challenge the constitutionality of the arrest.

This Court should grant this writ application to review the manner in which the Fifth Circuit is applying *Heck* to bring consistency to its circuit courts.

A. Nature of the Case

This Section 1983 action arises out of a November 3, 2006, traffic stop.

During the early morning hours of November 3, 2006, a wet and cold night, Mr. Walker was awoke and sent to the store to retrieve medication for his pregnant fiance. Mr. Walker pulled over after he noticed a police vehicle following him that directed a search light into the car.

A Denham Springs K-9 unit police officer approached requesting license and registration. When Mr. Walker turned toward the car to reach for the glove box, he was struck from behind and went down, and some point, he was turned and maced directly in his eyes. That same officer radioed for back up.

When the next officers arrived, Mr. Walker was already face down on the ground with his hands behind his back. An officer began moving his arms and instructed Mr. Walker to stop resisting arrest. Mr. Walker responded that he was not resisting.

One officer placed his boot on the back of Mr. Walker's neck forcing his head against the concrete, while yet another officer kicked him in the ribs, head, legs and back. Mr. Walker testified, "I was cuffed. I was kicked in the sides, in my hip and in my head." He was lifted and dropped on his face while handcuffed and "[a]fter that everything pretty much come a blur. I was hyperventilating. I couldn't breathe. I lost eyesight in the both eyes. Everything just started happening real fast."

Mr. Walker testified repeatedly both during his deposition and the criminal trial that after being struck on the head, he had little memory of the incident. He does not recall running, entering any woods, his clothing being removed, or numerous other events of the night. Moreover, early on he was maced directly in his eyes and was blind during most of the incident. Mr. Walker testified he lost consciousness.

In his trial testimony in state court, Mr. Walker testified as follows:

> Q. What do you recall after being struck from behind?
>
> A. Basically, I, I remember hitting the ground. After that everything went - just became a blur because it — I was in shock. I was — I really couldn't place what was happening.
>
> Q. Do you recall what happened, though, what do you recall happening —
>
> A. Just —
>
> Q. After you got struck from behind?
>
> A. Just hitting the ground. That was just basically all. I just kind of blacked out. I was not sure what was really going on at that time.

Q. Okay. Did you run?

A. No ma'am, I don't believe I did.

Q. The officer says as soon as he stopped, you got out of the car and started running.

A. No, ma'am, I don't recall myself running.

Q. Okay. What — at what point do you recall what was going on; I mean, are you kicked, punched, or anything like that?

A. I remember being kicked in the side of the head and the right side of my hip, my face. Basically all over. It was just — I just felt like I was just getting beat on. Like I said, I started to hyperventilate, I blacked out after being sprayed. I was not able to see anything. My breathing was very hard.

Q. All right. Now, do you remember them taking you out of the woods.

A. No, ma'am.

Q. Okay. Do you remember walking at all.

A. No ma'am.

Q. What is the next thing that you recall?

A. Being transported to Denham Springs Police Department.

Upon release, he went to the emergency room for treatment. Among multiple lacerations and bruises, his left knee bore a four-inch cut and bruising. He had difficulty walking and balancing himself due to hip, knee, and back injuries. After treatment, particularly to his corneal abrasions, he was released.

After being released, he began vomiting blood, returned, was advised that both of his kidneys had failed, and he was admitted for dialysis as shown by the certified medical records.

On July 3, 2007, Dr. F. Allen Johnston rendered a medical opinion of L-4/L-5 and L-5/S-1 disk injuries were related to the incident, and he recommended epidural steroid injections and other procedures.

Mr. Walker was charged and convicted by a Denham Spring City Court of three (3) counts of resisting arrest and (1) **count of failure to use a turn signal**, for which he was fined.

Each of the three officers involve deny any harmful touching took place; yet, the medical records and booking and other photographs document injury.

According to Officer Munsell, he initiated three charges of resisting arrest for the following acts:

> Q. Who initiated the complaint with three charges of resisting?
>
> A. I did. [Munsell]
>
> Q. And the charges as I understand it are he ran, he put his hands on his torso, and what was the third one?
>
> A. When he put his hands under his torso he resisted more than one police officer.

The charges of resisting arrest, thus, do not address any alleged violent conduct on the part of Mr. Walker or the Officers. The charges in no manner address any of the injuries sustained by Mr. Walker during the stop. The Officers in no manner account for any harmful touching during the arrest.

The *Transcript* of the criminal proceeding reveal that the Denham Springs City Court Judge made no findings of fact remotely addressing how Mr. Walker was injured during the incident. None address any harmful touching by any of the officers. There is no finding of reasonable force.

There are no fact findings of what physical contact transpired prior, during or after Mr. Walker entered the woods. The only touching reported is that Officer Munsell admits to pushing Mr. Walker to the ground and macing him. Officer Walker admits to a brief attempt

to pull Mr. Walker's arms from under his body. On the other hand, Mr. Walker does not recall ever running, being in the woods, and claims he was battered both before and after being handcuffed. The conviction did not require any finding as to whether the force used in making an arrest was "reasonable."

B. Procedural history

On November 13, 2006, the Plaintiffs filed *Complaint* pursuant to 42 U.S.C. § 1983 asserting a cause of action for excessive force, unreasonable search and seizure, deliberate indifference to medical needs, cruel and unusual punishment and malicious prosecution naming five Denham Springs City Police Officers, three of whom remain as party defendants.[1] On January 10, 2007, the answer filed **failed to set forth an affirmative defense related to the *Heck* motion** that followed.

On May 25, 2007, after limited discovery, the remaining officers, who are respondents herein, filed a motion for partial summary judgment seeking dismissal of the 8th Amendment claim for cruel and unusual punishment. Unopposed the motion was granted.

On May 25, 2007, those officers filed a second motion requesting a dismissal without prejudice or a stay of the action pending the outcome of the criminal

1. Since Mr. Walker had little sight during or memory of the event, several depositions limited to the issue of the qualified immunity affirmative defense were taken, after which, two officers, whose involvement was shown to be tangential rather than direct, were voluntarily dismissed.

prosecution in light of *Heck*. ("[C]laims are **premature** and have not accrued in light of the pending criminal prosecution".) [Emphasis added]

On July 3, 2007, the Plaintiffs filed an opposition to the Defendants' motion to dismiss and alternative motion for stay to which the Defendants replied. On August 24, 2007, the District Court entered *Ruling on Motion to Dismiss* overruling the motion to dismiss the claims for failure to provide medical treatment and withholding ruling on the dismissal of the claims for unreasonable search and seizure and excessive force until "notified of results of the plaintiff's [criminal] trial in state court."

On August 27, 2007, the Defendants renewed their motion to dismiss the excessive force claim and supplemented the record with the state court conviction of Clayton Walker for three (3) counts of resisting an officer and (1) **count of failure to signal**, for which he was fined.

On August 28, 2007, the District Court entered *Order* allowing the Plaintiffs an opportunity to file a response finding that if no response was filed "the claims for excessive force and malicious prosecution will be dismissed with prejudice to their being asserted again until the *Heck* conditions are met."

On or before September 17, 2007, the Plaintiffs filed an opposition to the second motion to dismiss. The Plaintiffs attached a certified medical record relating the back injuries to the incident.

On September 20, 2007, the District Court entered *Order* converting the motion to dismiss to a summary judgment. The Plaintiffs filed an additional memorandum with additional certified medical records from the emergency room treatment following the incident.

On October 1, 2007, the District Court entered *Ruling on Motion for Summary Judgment*, dismissing the Plaintiffs' excessive force and malicious prosecution claims "with prejudice until the *Heck* conditions are met".

After Plaintiffs unsuccessfully attempted to have the *Ruling* certified for appeal, the Plaintiffs opted to dismiss the remaining claim for failure to provide medical care on the basis that it was not cost effective to prosecute that claim alone to allow the present appeal on the excessive force claim. Final judgment was entered, from which an appeal followed.

On June 13, 2008, the Court of Appeal issued a *Per Curiam* decision to affirm the lower court ruling. The *Judgment* of the Fifth Circuit was issued as a mandate on July 8, 2008.

C. Statement of relevant facts

Mr. Walker was convicted of three counts of resisting arrest and failure to use a turn signal, which the Fifth Circuit found barred him from bringing a claim that excessive force was used against him during the arrest.

Despite the material facts at issue, the Fifth Circuit found that the claim —

> is not that the officers used excessive force after he stopped resisting or to stop his resistance; his claim is based solely on his assertion that he did not resist arrest, did nothing wrong, and was attacked by the Appellee officers for no reason. Thus, Appellant's suit 'squarely challenges the factual determination that under lies his conviction for resisting an officer,' and if he prevails, 'he will have established that his criminal conviction lacks any basis' *Arnold v. Town of Slaughter*, 100 F.App'x 321, 324-25 (5th Cir. 2004).

Not one of the lower courts mentions the fact that in this case, the officers deny any harmful touching; yet, Mr. Walker suffered serious bodily injury. Moreover, Mr. Walker testified that after getting out of the car and being hit, he basically remembers very little and that he cannot recall ever resisting arrest or doing anything to provoke the battery. After being maced he was virtually blind. Thus, not only did the Fifth Circuit improperly apply *Heck* to a Section 1983 action, where material facts are in dispute, which precluded summary judgment, they applied it to a case where there was no confinement.

REASONS FOR GRANTING THE PETITION

A. Does a conviction of resisting arrest bar a 28 U.S.C. § 1983 excessive force claim arising out of the arrest under *Heck v. Humphrey*?

Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), involved a prisoner who was challenging the constitutionality of his arrest and conviction. This Court granted writs and noted that the prisoner had two avenues: writ of habeas corpus or civil rights action. The Court determined that where habeas relief was still available to assert the constitutional challenge, the prisoner could not yet bring the civil rights action. That was *Heck*, plain and simple, but since *Heck*, dicta within that case has formed a spring board for certain minority circuit courts to apply *Heck* to criminal convictions, from which an appeal may lie that would not invoke a constitutional challenge, to dismiss numerous civil rights cases where the plaintiff has no avenue for the constitutional challenge to actions of police officers taken during an arrest. *Heck* is being applied to nonprisoners who have no right to seek a writ of habeas corpus to challenge the constitutionality of the arrest, conviction or sentence. This application for a writ of review seeks clarification from this Court as to whether this Court intended such result and to resolve the split in the circuits.

In *Heck v. Humphrey*, 512 U.S. 477, 486, 114 S.Ct. 2364, 2370, 129 L.Ed.2d 383 (1994), this Court wrote:

> This requirement "avoids parallel litigation over the issues of probable cause and guilt

> . . . . and it precludes the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction."[2] . . . We think the hoary [ancient] principle that civil tort actions are not appropriate **vehicles for challenging the validity of outstanding criminal judgments** applies to § 1983 damages actions **that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution**. [Emphasis added]

Since *Heck*, the dicta, cited above, has formed a spring board for the Fifth Circuit to find that *Heck* precludes excessive force claims arising out of arrests where the habeas ineligible plaintiff has been convicted and fined for resisting the same arrest. It is unlikely that this Court intended such by its dicta in *Heck* as indicated by *Muhammad v. Close*, 540 U.S. 749, 750, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004), where this Court granted a writ to resolve yet another split in the circuit courts arising from the application of *Heck* to disciplinary proceedings and, there, explained the limited application of *Heck* by writing, as follows:

> In [Heck], we held that where success in a prisoner's § 1983 damages action would

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2. Citing, 8 S. Speiser, C. Krause, & A. Gans, American Law of Torts § 28.5, p. 24 (1991).

> **implicitly question the validity of conviction or duration of sentence**, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence. Accordingly, in *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), we applied Heck in the circumstances of a § 1983 action claiming damages and equitable relief for a procedural defect in a prison's administrative process, where the administrative action taken against the plaintiff could affect credits toward release based on good time served. **In each instance, conditioning the right to bring a § 1983 action on a favorable result in state litigation or federal habeas served the practical objective of preserving limitations on the availability of habeas remedies.** [Emphasis added]

In *Muhammad*, 540 U.S. at 754-755, the prisoner's § 1983 claim was allowed to proceed because, as this Court wrote, "That is, he raised no claim on which habeas relief could have been granted on any recognized theory, with the consequence that Heck's favorable termination requirement was inapplicable." The same rule of law should apply to excessive force claims where the plaintiff raises no claim on which habeas relief may be granted.

Nevertheless, while the Fifth Circuit has taken *Heck*'s quoted dicta, supra, in one direction, it appears

this Court has taken *Heck* in another direction and there is a split in the application of *Heck* between the 5th and nearly every other circuit in this Country. See e.g., *Nieves v. McSweeney*, 241 F.3d 46, 52-53, 52 n. 4 (1st Cir. 2001); *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999) (use of illegally obtained evidence does not, for a variety of reasons, necessarily imply an unlawful conviction); *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997) (holding that a finding of excessive force in a § 1983 action would not necessarily imply the invalidity of the plaintiff's conviction for resisting arrest); *Montgomery v. De Simone*, 159 F.3d 120, 126 (3rd Cir. 1998) (finding § 1983 false arrest claim not barred by *Heck*); *Robinson v. Doe*, 272 F.3d 921, 923 (7th Cir. 2001) (holding that a finding of excessive force in a § 1983 action would not necessarily imply the invalidity of the plaintiff's conviction for resisting arrest); *Wallace v. City of Chicago*, 440 F.3d 421, 428 (7th Cir. 2006) (aligning itself with the "The First, Third, Eighth, Tenth, and Eleventh Circuits."); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (finding § 1983 coerced confession claim not barred by *Heck*); *Smith v. City of Hemet*, 394 F.3d 689, 699 (9th Cir. 2005), *cert. denied sub nom, City of Hemet, Cal. v. Smith*, 545 U.S. 1128, 125 S.Ct. 2938, 162 L.Ed.2d 866 (2005) ("Because on the record before us we cannot determine that the actions that underlay Smith's conviction upon his plea of guilty occurred at the time of or during the course of his unlawful arrest, Smith's success in the present action would not necessarily impugn his conviction."); *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1127 (10th Cir. 1999) (holding that a finding of excessive force in a § 1983 action would not necessarily imply the invalidity of the plaintiff's conviction for resisting arrest);

Beck v. City of Muskogee Police Dep't, 195 F.3d 553, 558, 559 n. 4 (10th Cir. 1999); *Datz v. Kilgore*, 51 F.3d 252, 253 n. 1 (11th Cir. 1995) (per curiam) (finding § 1983 illegal search claim not barred by *Heck*); *Willingham v. Loughnan*, 261 F.3d 1178, 1183 (11th Cir. 2001), *cert. granted and judgment vacated on other grounds*, 537 U.S. 801, 123 S.Ct. 68, 154 L.Ed.2d 2 (2002) (holding that a finding of excessive force in a § 1983 action would not necessarily imply the invalidity of the plaintiff's conviction for resisting arrest).

The fact that *Heck* struck a balance between habeas corpus and civil relief has long been tossed by the wayside in the Fifth Circuit, where *Heck* has become a bar to prosecuting excessive force cases in cases where the plaintiff is convicted of resisting that arrest.

The Fifth Circuit itself has recognized that it is in the minority position and in *DeLeon v. City of Corpus Cristi*, 488 F.3d 649 (5th Cir. 2007), where the plaintiff who was maced and shot, pled guilty to aggravated assault on a police officer, and brought a 1983 action claiming false arrest, false imprisonment, malicious prosection, and **excessive force**. The facts pled by DeLeon described a violent scuffle with an officer, and a fight over the baton. DeLeon claimed he got the officer down in a bear hug and then backed off. The officer then pulled a gun and shot Mr. DeLeon several times including two shots that landed just below his heart. On conviction, Mr. DeLeon *received a deferred adjudication* and, thus, was not incarcerated. Nevertheless, the Fifth Circuit found the *Heck* favorable termination bar applied.

Without any discussion as to how a judgment in favor of *DeLeon* on his excessive force claim would "necessarily" implicate the invalidity of his conviction or sentence, the Fifth Circuit recognized the following,

> "*Heck*'s favorable termination doctrine is supported by two somewhat -independent rationales, which divide the Court and circuits even today. One, articulated by Justice Scalia, views Heck foremost as a section 1983 decision, narrowing the reach of that civil-rights statute by reference to the common law of tort in 1871. Another, articulated by Justice Souter, views Heck foremost as a habeas decision, a practical gloss on section 1983 to accommodate the habeas statute's exhaustion requirements. This circuit remains in the first camp, where Heck stands first for 'the hoary [ancient] principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments.' In short, the common law animated Heck, and so it lights our way today."[3]

Acknowledging the split in the circuits, the Fifth Circuit, 2007 WL 1560082, at *4, nt. 23, listed, the following, "Compare *Jenkins v. Haubert*, 179 F.3d 19, 26 (2d Cir. 1999) (adopting Justice Souter's view that *Heck* should apply only when the plaintiff has access to a habeas remedy) and *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 n. 3 (6th Cir. 1999) and *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999) with *Cabrera v. City*

3. All footnotes and citations omitted.

of Huntington Park, 159 F.3d 374, 308 n. 6 (9th Cir. 1998)[4] (holding that *Heck* applies in all section 1983 suits regardless of the plaintiff's access to habeas) and *Figueroa v. Rivera*, 147 F.3d 77, 81 n. 3 (1st Cir. 1998)."

Guidance from this Court is necessary to light the way for the circuits split on this issue.

Of *DeLeon*, applying *Heck* to a habeas ineligible plaintiff, in this case, the Fifth Circuit found that "*Heck* barred Appellant's excessive force claim where his complaint maintained that he did not resist arrest and did nothing wrong and provided no alternative pleading or theory of recovery."

The Eleventh Circuit, and numerous others, have taken the opposite approach and not only limited both the "necessarily" requirement of *Heck*, but those circuits have also found that *Heck* does not apply to habeas ineligible plaintiffs.

For example, in *McClish v. Nugent*, 483 F.3d 1231 (11th Cir. 2007), a Plaintiff, who was charged with "resisting arrest without violence" for interfering with an ongoing arrest of another Plaintiff was not barred from bringing a § 1983 claim for false arrest. According to the Eleventh Circuit the primary claims barred by *Heck* are those for an **allegedly unconstitutional conviction or imprisonment**. The second application of *Heck* only bars suits to recover damages "for other

4. But see, *Nonnette v. Small*, 316 F.3d 872, 875-77 (9th Cir. 2002) (*Heck* inapplicable where plaintiff already released from jail).

harm caused by actions whose unlawfulness would render a conviction or sentence invalid." Citing, *Heck*, 512 U.S. at 486, 114 S.Ct. 2364. In such cases, the Defense must show that the Plaintiff would have to "negate an element of the offense of which he has been convicted."

To the extent *Heck* applies to claims for which there is no habeas corpus avenue, the test set forth by the *Heck* case is as follows:

> But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any **outstanding criminal judgment** against the plaintiff, the action should be allowed to proceed. *Heck*, 512 U.S. at 487, 114 S.Ct. at 2372. [Emphasis added]

In *Dyer v. Lee*, 488 F.3d 876 (11th Cir. 2007), a plaintiff, convicted of resisting arrest with violence, brought a § 1983 action for excessive force. Rejecting the application of *Heck*, the Eleventh Circuit, wrote, "[A] finding of excessive force by the jury in this civil case does not necessarily call into question the validity of section 1983 Plaintiff's criminal conviction [for attempted murder and battery of an officer]."[5]

> "A reasonable jury could, without too much trouble, find both that the defendants used

5. Citing and quoting, *Willingham v. Loughnan*, 261 F.3d 1178, 1183 (11th Cir. 2001), *cert. granted and vacated on other grounds*, 537 U.S. 801, 123 S.Ct. 68, 154 L.Ed.2d 2 (2002).

> excessive force, and that not all of plaintiff's violent acts were justified as self-defense. In other words, the determination is ultimately factual, and thus we cannot say, as a matter of law, that a successful § 1983 suit would necessarily negate the underlying conviction given the facts in the record."

Quoting the Seventh Circuit,[6] the Eleventh Circuit, through *Dyer*, provided a strong policy reason for not interpreting *Heck* as the Fifth Circuit has done and wrote, as follows:

> Were we to uphold the application of *Heck* in this case, it would imply that once a person resists law enforcement, he has invited the police to inflict any reaction or retribution they choose, while forfeiting the right to sue for damages. Put another way, police subduing a suspect could use as much force as they wanted — and be shielded from accountability under civil law — as long as the prosecutor could get the plaintiff convicted on a charge of resisting. This would open the door to undesirable behavior and gut a large share of the protections provided by § 1983.

The Eleventh Circuit's policy rationale alone provides a basis for this Court to resolve the split in the circuits. As long as there is a version of the facts which would allow the conviction to stand, that is sufficient, under *Heck*, to allow this § 1983 action to proceed.

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6. *VanGilder v. Baker*, 435 F.3d 689, at 692 (7th Cir. 2006).

Quoting the Supreme Court,[7] the Seventh Circuit, through *VanGilder*, 435 F.3d at 692, wrote, "In a more recent case, the Court emphasized the need for a clear nexus between the plaintiff's conviction and the alleged wrongful government action before the *Heck* bar applies. As Justice O'Conner wrote for a unanimous Court,

> [W]e were careful in *Heck* to stress the importance of the term 'necessarily.' For instance, we acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to § 1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not '*necessarily* imply that the plaintiff's conviction was unlawful.' 512 U.S. at 487, n. 7, 114 S.Ct. 2364 (noting doctrines such as inevitable discovery, independent source, and harmless error). To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination . . ."

In a recent Second Circuit decision, *McKithen v. Brown*, 481 F.3d 89, 102 (2d Cir. 2007), focusing on the "necessarily" requirement of *Heck*, the Second Circuit explained that "a § 1983 action that, at most, increases the *likelihood* that a plaintiff will eventually be able to overturn a still outstanding conviction, but which does not go so far as to *necessarily* demonstrate the conviction's validity" may still proceed.

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7. *Nelson v. Campbell*, 541 U.S. 637, 647, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004).

In *Powers v. Hamilton County Public Defender Commission*, 501 F.3d 592 (6th Cir. 2007), the Sixth Circuit noted the split in the circuits as to whether *Heck*'s favorable termination rule applies to § 1983 plaintiffs who are habeas ineligible, citing, *Muhammad*, where this Court found that *Huey v. Stine*, 230 F.3d 226, 230 (6th Cir. 2000), was not the case to settle that issue. Citing the split in the circuits, Sixth Circuit found that the better reasoned view is that of the Second, Ninth and Eleventh Circuits that *Heck*'s favorable termination requirement does not apply to habeas ineligible § 1983 plaintiffs. The split cited was *Figueroa v. Rivera*, 147 F.3d 77, 79 (1st Cir. 1998) (Heck bar applied to convict who died in prison even after death); *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) (declining to read *Spencer v. Kemna*[8] to allow former prisoner to maintain his § 1983 action); *Gilles v. Davis*, 427 F.3d 197, 209-10 (3d Cir. 1005) (*Heck* applies to habeas ineligible plaintiff); *Randell v. Johnson*, 227 F.3d 300, 301-02 (5th Cir. 2000) (applying *Heck* to plaintiff who was no longer imprisoned) compared to *Leather v. Ten Eyck* 180 F.3d 420, 424 (2nd Cir. 1999) (*Heck* inapplicable where plaintiff had been assessed only a monetary fine and ineligible for habeas relief); *Nonnette v. Small*, 316 F.3d 872, 875-77 (9th Cir. 2002) (*Heck* inapplicable where plaintiff already released from jail); *Harden v. Pataki*, 320 F.3d 1289, 1298-99 (11th Cir. 2003) (*Heck* inapplicable where plaintiff challenging extradition procedure had already been extradited).

In the minority position, the Fifth Circuit not only applies *Heck* to habeas ineligible plaintiffs, but also

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8. *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998).

interprets it to apply unless the plaintiff alleges that the excessive force occurred either before or after **but not during a... arrest.**[9]

Louisiana defines the crime of resisting arrest,[10] as follows:

> Resisting an officer is the intentional interference with, opposition or resistance to, or obstruction of an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of property to serve any lawful process or court order when the offender knows or has reason to know that the person arresting, seizing property or serving process is acting in his official capacity.

The model jury instructions for the Fifth Circuit Court of Appeal for excessive force claims provide, in part, as follows:

> The third aspect of the plaintiff's claim is that the defendant(s) used excessive force in making the arrest. Every person has the constitutional right not to be subjected to unreasonable or excessive force **while being arrested by law enforcement officers, even though such arrest is otherwise proper.** However, in making a lawful arrest, an officer

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9. *Arnold v. Town of Slaughter*, 100 Fed.Appx. 321 (5th Cir. 2004).

10. La. R.S. 14:108 Resisting an officer.

has the right to use such force as is necessary under the circumstances to complete the arrest. You must determine whether the force used in making the arrest of the plaintiff was unnecessary, unreasonable or excessively violent. **The force used in making an arrest is unnecessary, unreasonable or excessively violent if the arresting officer exceeded that degree of force which a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances.**

* * * *

1) The defendant intentionally committed acts which operated to deprive the plaintiff of a right secured by the Constitution of the United States;

2) The defendant acted under color of the authority of the State of Louisiana;

3) That the defendants acts were the legal cause of the plaintiff's damages.

United States citizens are protected against the use of excessive force by the Fourth Amendment to the Constitution. In order to prove that the defendant used excessive force in violation of the Fourth Amendment, the plaintiff must prove by a preponderance of the evidence: 1) some harm, that 2) resulted directly and only from the use of force that

> was clearly excessive to the need; and the excessiveness of which was 3) objectively unreasonable in light of the facts and circumstances at the time.
>
> * * * *
>
> The reasonableness inquiry is an objective one: the question is whether the officers actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. 2006 FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS — CIVIL, at 77-79.

The Pattern Jury Instructions themselves contemplate a claim for use of excessive force by an officer *while* effectuating a lawful arrest, which lawful arrest could also lead to a conviction for resisting arrest.

The status of the law in the Fifth Circuit allows a stay of the civil action pending conviction on a charge for resisting (exhaustion criminal procedures). The claim is further subject to dismissal on the basis of *Heck* except in instances involving 1) an officer who is not smart enough to institute a charge for resisting; or 2) the rare not guilty verdict on the charge. Such requirements to prosecute a Fourth Amendment civil rights violation are not on the books and have a chilling effect on filing such claims.

This Court's intervention is necessary to protect civil rights claims from virtual extinction in the Fifth Circuit.

In the *Walker* matter, before this Court, the Officers offer no explanation for, and denied using any physical force that would have explained the injuries that Mr. Walker sustained. Mr. Walker has produced proof of his injuries and they were not there before he left for Wal Mart.

The District Court dismissed the present action with prejudice "until *Heck* conditions are satisfied", which is tantamount to a finding of prematurity, lack of ripeness or other cause to avoid this lawsuit.[11] Such a finding is contrary to *Wallace*, which held that the applicable statute of limitations starts to run from "the time the claimant becomes detained pursuant to legal process." *Wallace v. Kato*, 127 S.Ct. 1092, 1000 (2007).[12] It cannot be that the statute of limitations runs from the time the claimant is detained, yet, the claim is premature and subject to dismissal with prejudice until such time as the conviction upon which detention was based is reversed. Such concepts are mutually exclusive.

In *Edwards v. Balisok*, 520 U.S. 641, 649, 117 S.Ct. 1584, 1589, 137 L.Ed. 2d 906 (1997), Justice Scalia wrote as follows:

> Since we are remanding, **we must add a word concerning the District Court's decision to stay this § 1983 action** while respondent

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11. See, *Brandley v. Keeshan*, 64 F.3d 196 (5th Cir. 1995) (holding that a false arrest cause of action accrues when the criminal prosecution terminates in favor of the accused).

12. *Wallace v. Kato*, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007).

> sought restoration of his good-time credits, rather than dismiss it. **The District Court was of the view that once respondent had exhausted his state remedies, the § 1983 action could proceed.** App. to Pet. for Cert. F-14. **This was error. We reemphasize that § 1983 contains no judicially imposed exhaustion requirement,** *Heck*, 512 U.S., at 481, 483, 114 S.Ct., at 2369, 2370-2371; **absent some other bar to the suit, a claim either is cognizable under § 1983 and should immediately go forward,** or is not cognizable and should be dismissed. (Emphasis added)

Here, the lower courts have erred in dismissing the excessive force claim "with prejudice to their being asserted again until the *Heck* conditions are met."

B. Where the Plaintiff was not sentenced to incarceration and has no legal basis to file a writ of habeas corpus, did the lower courts err in finding *Heck* applicable to the present § 1983 action?

Finding that *Heck* applies not only to prisoners, but also to those convicts who do not have a remote possibility of invoking habeas corpus relief from confinement, here, the District Court, itself, cited, *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000), and *Dible v. Scholl*, 410 F.Supp.2d 807, 822, nt. 11 (N.D. Iowa 2006), to show the split in the circuits on this issue.

The *Dible* court critically rejected both the holding and rationale of *Randell* and explained why there is good

cause for this Court to clarify these issues amongst the circuits, 410 F.Supp at 825, writing,

> "'It is unfair to require a person who is legally precluded from challenging his or her conviction or sentence on habeas grounds to demonstrate that the conviction or sentence had been overturned or invalidated.'[13] A conclusion to the contrary would create a 'patent anomaly,' whereby prisoners who are still in custody are provided with a forum to redress constitutional wrongs, but those individuals who are no longer in custody or never were in custody have no forum in which to enforce their rights. . . . Therefore, this court concludes that *Heck*'s favorable termination requirement is not applicable to a § 1983 plaintiff who is unable as a matter of law to bring a habeas petition to challenge a conviction or sentence."

This very same rationale should apply in the all circuits.

In *Pethtel v. Washington County Sheriff's Office*, 2007 W.L 2359765 (S.D. Ohio 2007), that court wrote, as follows:

> Moreover, because Plaintiff's sentence consisted of a fine rather than imprisonment, a habeas remedy was never available to him. **As the Sixth Circuit has noted, five justices**

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13. Citing and quoting, *Zupan v. Brown*, 5 F.Supp. 2d 792, at 797 (N.D. Cal. 1998).

> **of the Supreme Court are of the belief that the *Heck* bar, requiring a plaintiff to have his sentence or conviction invalidated before filing a § 1983 suit, does not apply when the plaintiff has not been sentenced to a term of imprisonment.**[14] [Emphasis added]

Here, Mr. Walker was not subject to confinement and *Heck* does not apply. This rule should apply in all circuits.

The *McClish* Court, 483 F.3d at 1252, note 19, recited the entire history of the *Heck* line of cases and noted that "the [Supreme] Court had 'expressed the view that § 1983 claims are barred only when the alternative remedy of habeas relief is available.'"[15]

In *Wilkinson v. Dotson*, 544 U.S. 74, 76 and 83, 125 S.Ct. 1242, 1244, 161 L.Ed.2d 253 (2005), this Court clarified its use of the word "sentence" in *Heck* and explained that in *Heck* the word "sentence" refers to "substantive determinations as to the length of confinement." Success on the merits of Mr. Walker's excessive force claim will not in any manner affect Mr. Walker's conviction, his record, or result in a rebate of his fine. Moreover, Mr. Walker's civil claim does not

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14. Citing, see, *Fox v. VanOosterum*, 176 F.3d 342, 352 n. 8 (6th Cir. 1999). See also *Johnson v. Freeburn*, 144 F. Supp.2d 817, 827 (E.D. Mich. 2001).

15. Citing, *Abusaid v. Hillsborough County Board of County Commissioners*, 405 F.3d 1298 (11th Cir. 2005), and cases cited therein.

lie at "the core of habeas corpus." This Court's numerous precedents following *Heck* have been pieced together by the circuit court, as if building a jigsaw puzzle, resulting in the creation of two completely different pictures. This Court should grant this writ application and resolve the split in the circuits and explain in this case just how the puzzle pieces fit together.

Through *Heck*, this Court

> "has developed an exception from § 1983's otherwise broad scope for actions that lie 'within the core of habeas corpus,'[16] where a state prisoner requests present or future release. Section 1983 remains available for procedural challenges where success *would not necessarily* spell immediate or speedier release for the prisoner,[17] but the prisoner cannot use § 1983 to obtain relief where success *would necessarily* demonstrate the invalidity of confinement or its duration."[18]

Wilkinson, 544 U.S. at 74-75, 125 S.Ct. at 1243-1244.

This Court should find that the circuit courts that apply *Heck* to habeas ineligible plaintiffs, like Mr. Walker, are in error.

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16. Citing, *Preiser v. Rodriguez*, 411 U.S. 475, 487, 93 S.Ct. 1827, 36 L.Ed.2d 439.

17. Citing, see, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

18. Citing, see, e.g., *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed. 2d 383.

C. Where the Defendants failed to affirmatively assert a *Heck* related defense in their *Answer*, was the *Heck* defense waived and did the lower courts err in allowing the Defendants to raise by motion a defense not pled in the answer?

The Plaintiffs have consistently maintained an objection to the District Court hearing an affirmative defense not raised in the answer.

FRCP 8 (c), provides in pertinent part:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction . . . res judicata . . . **and any other matter constituting an avoidance or affirmative defense.** [Emphasis added]

FRCP 12 (b), provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . .

Here, the Defendants failed to plead the affirmative defenses of prematurity, failure to exhaust administrative procedures, ripeness, justiciability, collateral estoppel, *res judicata*, or any other corollary defense which may implicate *Heck*.

In failing to plead the *Heck* defense in their answer, the Defendants waived it. FRCP 8 (c), provides that "[i]n pleading to a preceding pleading, a party **shall** set forth affirmatively . . . **any other matter constituting an avoidance** [of the claims]". The failure to raise the *Heck* defense in the answer constitutes a waiver and summary judgment and/or a motion to dismiss should have been denied on that basis. See MOORE'S FEDERAL PRACTICE § 8.07. See also, *Laughman v. Pennsylvania*, 2007 WL 2345295, * 7 (M.D. Pa. 2007).

The lower courts erred in allowing the Defendants to raise by motion a defense not previously pled in the *Answer*.

D. Did the district court err in failing to certify its ruling on the excessive force claim for appeal?

The District Court abused its discretion in failing/refusing to certify its disfavorable summary judgment ruling that dismissed the excessive force claim for immediate appeal. The only claim that remained after the District Court dismissed the excessive force claim with prejudice was the failure/delay in medical treatment claim. Because that claim alone is not economically feasible to litigate, the Plaintiffs had to dismiss it to seek review of the dismissal of the excessive force claim.

It was not reasonable for the District Court to require the Plaintiffs to try that small claim, then appeal the main claim, and, then, possibly try the main claim.

This Court should grant this writ application and consider the Fifth Circuit's application of *Heck* to this case and the many others cited herein.

CONCLUSION

This Court is the gatekeeper for civil rights claims.

This writ application should be granted so that this Court may consider the course that dicta in *Heck* has taken and the prejudice it has reeked on civil rights claims in the Fifth Circuit.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JUNE 13, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-30087
Summary Calendar

CLAYTON ANTHONY WALKER, Individually and as the Administrator of the Estate of Breanna Nicole Walker on behalf of Breanna Nicole Walker

Plaintiff-Appellant

v.

RUSS MUNSELL, Officer; DAVID HOOTER, Officer; RODNEY WALKER, Officer

Defendants-Appellees

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:06-CV-867

Before WIENER, GARZA, and BENAVIDES, Circuit Judges.

Appendix A

PER CURIAM:*

In the early morning of November 3, 2006, Appellant Clayton Anthony Walker ("Appellant") was pulled over by an officer of the Denham Springs Police Department for failure to use a turn signal. According to Appellant, the officer approached the vehicle, requested that he exit the vehicle, and asked for his license and registration. When Appellant turned around to reach for the glove compartment, the officer allegedly struck him from behind and maced him in the face. After other officers arrived on the scene, Appellant contends that the officers beat him, causing substantial injuries. During the altercation, one officer instructed Appellant to stop resisting arrest, to which Appellant responded that he was not resisting.

The Appellee officers, however, contest these allegations. According to Appellees, after Appellant pulled over, he took off and ran into the woods. The officer who pulled Appellant over then chased Appellant and ultimately apprehended him. Thereafter, the officers later arriving on the scene attempted to handcuff Appellant but were unable to do so because Appellant was resisting arrest. Ultimately, one of the officers maced Appellant in the face and handcuffed him.

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* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Appendix A

On November 13, 2006, Appellant filed suit against the Appellee officers in federal court pursuant to 42 U.S.C. § 1983, alleging causes of action for unreasonable search and seizure and excessive force, malicious prosecution, cruel and unusual punishment, and failure to provide medical care. Subsequently, in July of 2007, Appellant was convicted in a Louisiana state court on three counts of resisting an officer and one count of failure to signal.

Based on Appellant's state court convictions, on October 1, 2007, the district court granted summary judgment in favor of Appellees on the excessive force and malicious prosecution claims pursuant to *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).[1] The district court stated: "The [Appellant's] excessive force and malicious prosecution claims are hereby dismissed with prejudice until the *Heck* conditions are satisfied." *Walker v. Munsell*, No. 3:06-

1. *Heck* provides:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

512 U.S. at 486-87 (footnote omitted).

CV-867, 2007 WL 3377202, at *5 (M.D.La. Oct.1, 2007). Appellant now appeals.[2]

Appellant first asserts that the district court erred by failing to find that Appellees waived their *Heck* defense by not pleading it as an affirmative defense in their answer. A *Heck* defense, however, is not waived by failure to plead it as an affirmative defense and can be brought by motion at trial. *See Watson v. New Orleans City*, 275 F.3d 46, 2001 WL 1268716, at *3 (5th Cir. Oct.16, 2001) (finding that the defendant did not waive her *Heck* defense by failing to plead it as an affirmative defense).[3]

Appellant next asserts that the district court's application of *Heck* was erroneous because a favorable judgment in his suit would not necessarily invalidate his conviction for failure to signal or for resisting arrest. *See Heck*, 512 U.S. at 487 ("But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should

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2. On July 24, 2007, the district court granted summary judgment in favor of Appellees on Appellant's claim of cruel and unusual punishment. Appellant does not contest this ruling on appeal. Furthermore, Appellant voluntarily dismissed his failure to provide medical care claim after the district court declined to certify its dismissal of Appellant's excessive force claim for interlocutory appeal.

3. *Watson* arrives at this conclusion by finding that "waivers of defenses based on grounds rooted in considerations of state sovereignty are applied less harshly than other waivers." 275 F.3d 46, 2001 WL 1268716, at *3.

be allowed to proceed. . . .") (footnote omitted). Rather, Appellant asserts that his civil rights claim can coexist with his conviction for resisting arrest, as he can show that he resisted a lawful arrest and that the officers used excessive force to effectuate that arrest. Appellant's claim, however, is not that the officers used excessive force after he stopped resisting or to stop his resistance; his claim is based solely on his assertions that he did not resist arrest, did nothing wrong, and was attacked by the Appellee officers for no reason. Thus, Appellant's suit "squarely challenges the factual determination that underlies his conviction for resisting an officer," and if he prevails, "he will have established that his criminal conviction lacks any basis." *Arnold v. Town of Slaughter*, 100 F. App'x 321, 324-25 (5th Cir.2004). This type of excessive force claim is, therefore, the type of claim that is barred by *Heck* in our circuit. *Id.*; *see also DeLeon v. City of Corpus Christi*, 488 F.3d 649, 656-57 (5th Cir.2007) (holding that *Heck* barred Appellant's excessive force claim where his complaint maintained that he did not resist arrest and did nothing wrong and provided no alternative pleading or theory of recovery).

Third, Appellant argues that *Heck* does not apply because he was fined and not imprisoned following his conviction, and he consequently had no opportunity to challenge his conviction on habeas review. This circuit, however, has determined that *Heck*'s bar applies to both custodial and non-custodial § 1983 plaintiffs. *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir.2000).

Finally, Appellant contends that the district court abused its discretion in refusing to certify its dismissal of his excessive force claim for immediate appeal under Federal Rule of Civil Procedure 54(b). This argument is wholly without merit.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA ADJUDICATING UNOPPOSED MOTION FOR VOLUNTARY DISMISSAL DATED JANUARY 11, 2008

CIVIL ACTION NO. 3:06-867
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT

JUDGE BRADY

MAGISTRATE RIEDLINGER

CLAYTON ANTHONY WALKER, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF BREANNA NICOLE WALKER COURT

v.

OFFICER RUSS MUNSELL, OFFICER DAVID HOOTER, and OFFICER RODNEY WALKER

ORDER ADJUDICATING UNOPPOSED MOTION FOR VOLUNTARY DISMISSAL

CONSIDERING the *Unopposed Motion for Voluntary Dismissal*, the motion is hereby GRANTED.

The only remaining claim is the Plaintiffs' claim for the failure to provide medical treatment, which is hereby dismissed with prejudice.

Appendix B

All matters having been disposed of by this Court, this matter is hereby dismissed on this entry of this Final Judgment.

Baton Rouge, Louisiana this 11th day of January, 2008.

s/ James B. Brady
Judge James B. Brady
District Judge

APPENDIX C — RULING ON MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA FILED OCTOBER 1, 2007

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 06-867-JJB-SCR

CLAYTON ANTHONY WALKER, ET AL.

VERSUS

OFFICER RUSS MUNSELL, ET AL.

RULING ON MOTION FOR SUMMARY JUDGMENT

This matter is before the court on a renewed motion to dismiss the Plaintiffs' § 1983 claims (doc. 59) filed by Defendants Russ Munsell, David Hooter, and Rodney Walker.[1] The Plaintiffs, Clayton Anthony Walker, et al., filed an opposition (doc. 66, 71), and the Defendants filed a reply brief (doc. 69). On September 20, 2007, the court converted the renewed motion to dismiss to a motion for summary judgment (doc. 75) in light of the evidence submitted by the parties. Oral argument is not necessary in this case. The court's jurisdiction exists pursuant to 28 U.S.C. § 1331.

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1. This Court dismissed all claims against officers Gerald Parker and John Albritton on April 5, 2007 (doc. 33).

Appendix C

Factual Background

The Plaintiff filed the instant action following his arrest for failure to use a turn signal. The Plaintiff alleges that he was kicked and beaten after being pulled over by the police. The Plaintiff contends that he was struck from behind after being asked for his driver's license, and he does not remember what happened subsequently because he blacked out.

The Defendants in this case contest these allegations The Defendants testified that after pulling the Plaintiff over for failure to signal, the Plaintiff took off running into the woods. After catching the Plaintiff, Officer Munsell testified that he pushed the Plaintiff to the ground and held him until the other officers arrived. Corporal Walker testified that he attempted to handcuff the Plaintiff who resisted by hiding his hands under his chest. Officer Munsell then administered Freeze-Plus-B spray to the Plaintiff's face so that Corporal Walker could handcuff the Plaintiff.

In July of 2007, the Plaintiff was convicted in a Louisiana state court on three counts of resisting arrest and one count of failure to signal. The Plaintiff asserts causes of action for violation of his civil rights under 42 U.S.C. § 1983 including: (1) unreasonable search and seizure and excessive force; (2) deprivation of his Fourteenth Amendment to be free from malicious prosecution; and (3) violation of his substantive due process rights under the Fourteenth Amendment based on the Defendants' alleged failure to tend to the Plaintiff's medical needs as a pretrial detainee.

Appendix C

In its ruling of August 24, 2007, this court held that the Plaintiff's failure to provide medical care claim was timely and not subject to dismissal. This court also asked the parties to supplement the record in light of the state criminal proceedings so that the court could rule on the Plaintiff's other claims.

Objection to Plaintiffs' Improper Exhibit

in the Defendants' Reply Memorandum in Support of their Renewed Motion to Dismiss or Stay (doc. 69), the Defendants object to Plaintiffs' submission of an unauthenticated letter to support their opposition to dismissal. Plaintiffs have corrected the alleged defect by refiling an authenticated letter, so the court will overrule this objection.

Heck v. Humphrey Standard

Under the rule of *Heck v. Humphrey*, a plaintiff seeking to recover for alleged constitutional violations with respect to conviction, imprisonment, or other harms caused "whose unlawfulness would render a conviction or sentence invalid . . . must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck v. Humphrey,* 512 U.S. 477, 486-87 (1994). The "core of *Heck* is a proscription against allowing a civil tort suit to cast doubt on a criminal conviction." *Bush v. Strain,*

2004 U.S. Dist. LEXIS 9358, *11 (E.D. La. 2004). However, if there is no contradiction to the criminal conviction, the claim may proceed. *Drake v. City of Pearl, Mississippi,* 494 F. Supp. 2d 437 (S.D. Miss. 2007). if, however, the civil claim would contradict the conviction or sentence and the plaintiff has failed to satisfy the *Heck* requirements, the Fifth Circuit directs lower courts to dismiss the party's claims "with prejudice to their being asserted again until the *Heck* conditions are met." *DeLeon v. City of Corpus Christi,* 488 F.3d 649, 657 (5th Cir. 2007).

Analysis

1. *Heck* as an Affirmative Defense

In the Plaintiffs' Opposition to the Renewed Motion to Dismiss (doc. 66), the Plaintiffs contend that the Defendants have waived *Heck* as a defense, because it was not raised as an affirmative defense in the Answer. The Plaintiffs argue that the *Heck* rule falls under the residual clause of Federal Rule of Civil Procedure 8(c) which requires a party to "set forth affirmatively . . . res judicata, . . . and any other matter constituting an avoidance or affirmative defense." Fed. Rule Civ. P. 8(c).

Courts interpreting the residual clause have included "qualified immunity, exhaustion of administrative remedies, and ERISA preemption" as affirmative defenses which must be raised in the answer. *Quintana v. Gates,* 2004 WL 1661540, *4 (C.D. Cal. 2004). However, courts have not extended the residual clause

to explicitly cover the *Heck* doctrine. *Id.* at *5. Defenses which concern the court's jurisdiction are not waived if omitted from the answer, but may be raised by motion. Fed. Rule Civ. P. 12(b). The *Quintana* court explains, "As a rule of accrual, the *Heck* doctrine more closely resembles a jurisdictional barrier, because if the claim has not accrued, then the court would not have subject matter jurisdiction over the claim." *Quintana*, 2004 WL 1661540, at *5. Therefore, in the instant action, failure to raise *Heck* as a defense in the answer does not preclude the Defendants from arguing the *Heck* doctrine in subsequent motions. The Plaintiffs' objection to use of the *Heck* doctrine is hereby overruled.

II. Section 1983 Claims Versus Habeas Relief

The Plaintiff contends that *Heck* does not apply because he was fined rather than imprisoned following his convictions for resisting arrest. The Plaintiff asks this court to allow his § 1983 claim to go forward because habeas relief is unavailable to the Plaintiff who is not in police custody.

In *Heck*, the Court determined that claims were not cognizable under § 1983 when the resolution of the claim would cast doubt on the validity of an outstanding criminal conviction or sentence. *Heck*, 512 U.S. at 486-87. Also known as the "favorable termination" requirement, all nine Justices agreed in *Heck* that it applied to § 1983 actions that might challenge an outstanding conviction or sentence, but the justices diverged on the reason for and extent of this

requirement. *Dible v. Maynard*, 410 F. Supp. 2d 807, 815 (N.D. Iowa 2006).[2]

The Court revisited the favorable termination issue in *Spencer v. Kemna*. *Spencer v. Kemna*, 523 U.S. 1 (1998). In *Spencer*, the plaintiff completed his imprisonment before the court ruled upon his habeas petition. *Id.* at 6. This led the Supreme Court to consider whether the expiration of his sentence mooted his habeas petition. *Id.* at 7. Speaking for the majority, Justice Scalia concluded that the petition was properly dismissed as moot because it failed to present a case or controversy as required by Article III, § 2 of the Constitution. *Id.* at 18. The plaintiff in *Spencer* contended that the petition could not be mooted because that would eliminate his opportunity to demonstrate favorable termination as required under *Heck*. *Id.* at 17. Justice Scalia dismissed this argument as a "great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available." *Id.* However, the scope of Justice Scalia's statement is somewhat ambiguous in *Spencer* because Justice Souter's concurrence contends that *Heck* is inapplicable when the plaintiff is not in custody and thus lacks access to habeas relief. *Id.* at 20-21 (Souter, J., concurring).

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2. Although the court recognizes that the *Dible* case is not controlling, it provides a lengthy discussion of the current circuit split regarding § 1983 challenges for persons who are ineligible for habeas relief.

Appendix C

Lower courts are now left with the responsibility of determining the breadth of the favorable termination rule in light of *Heck* and *Spencer*. *Dible*, 410 F. Supp. 2d at 820. The circuit courts are split with respect to the favorable termination requirement for persons without access to habeas relief. *Id.* The *Dible* court explains the circuit split as follows:

> First, are those courts that find *Heck* directly controls this issue. Therefore, because *Spencer* did not overrule *Heck*, these courts conclude that a prisoner is not in custody within the meaning of the habeas statute or whose habeas action has been mooted upon his release from incarceration, remains nonetheless precluded from bringing a claim for damages under § 1983 under the language in *Heck*. Second, are those courts that follow Justice Souter's logic in *Spencer* and find that *Heck* did not affirmatively decide the issue, leaving these courts free to conclude that a prisoner without recourse under the habeas statute may bring an action under the broad scope of § 1983.

Id. at 820. The Fifth Circuit falls into the first camp. *Randell v. Johnson*, 227 F.3d 300, 301-02 (5th Cir. 2000). The Fifth Circuit concludes that a claim for damages under § 1983 is not cognizable under the plain language

of *Heck* unless the plaintiff can first demonstrate favorable termination. *Id.* at 301. The Fifth Circuit explains,

> [W]e decline to announce for the Supreme Court that it has overruled one of its decisions . . . We are mindful that dicta from concurring and dissenting opinions in a recently decided case, *Spencer v. Kemna*, may cast doubt upon the universality of Heck's 'favorable termination' requirement. The Court, however has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court 'the prerogative of overruling its own decisions.' We obey this admonition.

Id. (quoting *Figueroa v. Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998); citations omitted).

In the instant action, Mr. Walker was not in custody when he filed his claims under § 1983 so habeas relief was not available to him.[3] Consistent with the Fifth Circuit's opinion in *Randell*, this court must apply the plain language of *Heck*. In other words, a plaintiff must

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3. The court recognizes that Mr. Walker and the plaintiff in *Randell* were sentenced differently: Mr. Walker a fine versus Randell's incarceration. However, the effect *of Heck* on these cases is similar because neither party has access to habeas relief.

demonstrate favorable termination prior to asserting a claim under § 1983 if that claim would necessarily imply the invalidity of the outstanding conviction. *Id.* at 301. Therefore, this court will evaluate the Plaintiffs' claims under § 1983 in light of *Heck* and its favorable termination rule.

III. Excessive Force Claim

Courts have found that the *Heck* rule bars an excessive force claim under Louisiana law when the conviction in question is for resisting arrest. *See Arnold v. Town of Slaughter,* 100 Fed. Appx. 321, 325 (5th Cir. 2004). In *Arnold,* the plaintiff was charged and convicted of resisting an officer. *Id.* The plaintiff then brought claims under § 1983 for false arrest, unreasonable search and seizure, false imprisonment, malicious prosecution, and excessive force. *Id.* Although the *Arnold* court noted that an excessive force claim would not "invariably invalidate" a conviction, it held that the plaintiff's claim for excessive force was barred by *Heck v. Humphrey. Id.* at 323-25.

The plaintiff in *Arnold* was convicted of resisting arrest under La. R.S. § 1408 which required the prosecution to prove that the officers were making a lawful arrest. Therefore, success on the § 1983 claim would challenge the validity of the conviction for resisting arrest. *Id.* at 325. In light of this challenge, the *Arnold* court held that the plaintiff's claims were

"distinguishable from excessive force claims that survive *Heck's* bar." *Id.* at 324. The court reached this conclusion because:

> Arnold testified that he never attempted to strike any of the officers, never threatened any of them and, in fact, never resisted their attempts to arrest him.
>
> . . .
>
> Thus, Amold's claims are not that the police used excessive force after he stopped resisting arrest or even that the officers used excessive and unreasonable force to stop he resistance. Instead, Arnold claims that he did nothing wrong, but was viciously attacked for no reason.

Id. at 324. In the instant case, Mr. Walker's claims are similar to the arguments raised by the plaintiff in *Arnold.*

Mr. Walker was convicted in a Louisiana state court of three counts of resisting arrest and one count of failure to signal.[4] The three separate counts included: (1) "when he initially ran"; (2) "when he was captured, he continued to actively resist"; and (3) when he resisted

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4. *See* City Court of Denham Springs Court Minutes for July 30, 2007 (doc. 63 at Exh. I).

as "Corporal Walker attempted to cuff him."[5] During his trial in state court and in his deposition, Mr. Walker maintains that he remembers doing nothing wrong and that these officers just attacked him.[6] This was the same

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5. *See* Certified Transcript, *City of Denham Springs v. Walker*, No. 221366, July 30, 2007 (doc. 63 at Exh. H) at 16.

6. *See* Certified Transcript, *City of Denham Springs v. Walker*, No. 221366, July 30, 2007 (doc. 63 at Exh. H) at 95-97. Mr. Walker's testimony is as follows:

> Q. Okay. What happened once the car stops; did you get out of the car?
>
> A. Yes, ma'am, I waited for a minute, opened my door and got out. I was—that's when Officer—now that I know the officer, it was Officer Munsell was approaching the car, asked me for my license and registration.
>
> Q. Okay. So what did you do then?
>
> A. Leaned back in the car to get it.
>
> Q. What happened after that?
>
> A. I was struck from behind.
>
> Q. What do you recall after being struck from behind?
>
> A. Basically I—I remember hitting the ground. After that everything went—just became a blur because it—I was in shock. I was—I really couldn't place what was happening.

(Cont'd)

argument made in *Arnold* which the Fifth Circuit held was distinguishable from excessive force claims that survive *Heck's* bar.

To convict Mr. Walker of resisting arrest, the prosecution had to prove that the officers were making

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(Cont'd)

> Q. Okay. Did you run?
>
> A. No, ma'am, I don't believe I did.
>
> Q. The officer says as soon as he stopped, you got out of the car and started running.
>
> A. No, ma'am, I don't recall myself running.
>
> Q. Okay. What-at what point do you recall what was going on; I mean, are you kicked, punched, or anything happen [sic] like that?
>
> A. I remember being kicked in the side of the head and the right side of my hip, my face. Basically all over. it was just—I just felt like I was just getting beat on. Like I said, I started to hyperventilate, I blacked out after being sprayed. I wasn't able to see anything. My breathing was very hard.

Id. at 95-96. In his deposition testimony, the defendant similarly denies running the night of the incident, claims he was struck from behind while reaching into his vehicle to get his driver's license, and states he started hyperventilating after being sprayed.

a lawful arrest. Denham Springs Code § 66-293;[7] *see also, Arnold*, 100 Fed. Appx. at 325. An officer making a lawful arrest may use "reasonable force to arrest and detain a person and to overcome any resistance or threatened resistance of the person being arrested or detained." La. Code of Crim. Pro. art 220 (West 2001).

Mr. Walker denies any recollection of resisting arrest, and he also denies running away from the officers. Although the moving party bears the burden of summary judgment, the non-movant cannot rely on conclusory statements or unsubstantiated assertions to create a genuine issue of material fact. *See Grimes v. Tex. Dep't of Mental Health*, 102 F.3d 137, 139-40 (5th Cir. 1996). The Plaintiff attempts to rely on his lack of memory to create a genuine issue of material fact, but this lack of evidence does not satisfy the non-movant's burden.

Evaluating the evidence submitted by both parties, Walker's excessive force claim necessarily challenges the lawfulness of his arrest and his convictions for resisting arrest. To prevail on the excessive force claim, Mr. Walker would have to prove that the police officer

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7. Denham Springs Code § 66-293 defines resisting an officer to encompass: (a) Resisting an officer is the intentional interference with, opposition or resistance to, or obstruction of an individual action in his official capacity and authorized by law to make a *lawful arrest* or seizure of property to serve any lawful purpose of court order when the offender knows or has reason to know that the person arresting, seizing property or serving process is acting in his official capacity.

used unnecessary or unreasonable force, and such a finding would necessarily be at odds with a conviction for resisting arrest. Therefore, until the *Heck* favorable termination requirement is met, this Plaintiffs excessive force claim will be dismissed with prejudice.[8]

IV. Malicious Prosecution Claim

A claim for malicious prosecution requires the plaintiff to establish: "(1) the commencement or continuance of an original criminal or civil judicial proceeding; (2) its legal causation by the present defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage conforming to legal standards resulting to the plaintiff. *Jones v. Soileau*, 448 So. 2d 1268, 1271 (La. 1984).

As previously discussed, Mr. Walker was convicted in a Louisiana state court of three counts of resisting arrest and one count of failure to signal. Therefore, the Plaintiff cannot establish the requisite element of proving prior termination of the criminal proceeding in his favor. *Jones*, 448 So. 2d at 1271. Because the Plaintiff has failed to satisfy the favorable termination requirement of *Heck*, he fails to state a claim upon which

---

8. The court recognizes that Mr. Walker lacks access to habeas relief. However, there is nothing precluding a direct appeal of the state court convictions, and a successful appeal would clearly satisfy the favorable termination requirements under *Heck*.

relief may be granted. *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000). Therefore, the Plaintiff's claim will be dismissed with prejudice until the *Heck* conditions are met.

V. Failure to Provide Medical Care Claim

As discussed in the court's August 24, 2007, ruling (doc. 58), the Plaintiffs' claim for lack of medical care is timely and not barred by the *Heck* doctrine. The Plaintiff's convictions for resisting arrest were temporally removed from the police's alleged failure to provide medical care, so a suit to recover damages for ignoring the Plaintiff's medical needs would in no way call into question the Plaintiff's convictions for resisting arrest.

Accordingly, the Defendants' renewed motion for summary judgment (doc. 59) is **GRANTED** with respect to the Plaintiffs' claims for excessive force and malicious prosecution, and Defendants' motion is **DENIED** with respect to the Plaintiffs' claim for failure to provide medical care. The Plaintiffs' excessive force and malicious prosecution claims are hereby dismissed with prejudice until the *Heck* conditions are satisfied.

Baton Rouge, Louisiana, October 1st, 2007

s/ James J. Brady
JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX D — RULING ON MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA FILED AUGUST 24, 2007

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NO.: 06-867-JJB-SCR

CLAYTON ANTHONY WALKER, ET AL.

VERSUS

OFFICER RUSS MUNSELL, ET AL.

RULING ON MOTION TO DISMISS

This matter is before the court on a motion to dismiss the §1983 claims asserted by the plaintiff (doc. 40) filed by defendants Russ Munsell, David Hooter, and Rodney Walker.[1] The plaintiffs, Clayton Anthony Walker, et at., filed an opposition (doc. 49), and the defendants filed a reply brief (doc. 54). The court's jurisdiction exists pursuant to 28 U.S.C. § 1331.

The plaintiff asserts causes of action for violation of his civil rights under 42 U.S.C. § 1983 including: (1) unreasonable search and seizure and excessive force;

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1. This Court dismissed all claims against officers Gerald Parker and John Albritton on April 5, 2007 (doc. 33).

(2) deprivation of his Fourteenth Amendment to be free from malicious prosecution; and (3) violation of his substantive due process rights under the Fourteenth Amendment based on the defendants' alleged failure to tend to the plaintiff's medical needs as a pretrial detainee.

Heck v. Humphrey Standard

Under the rule of *Heck v. Humphrey,* a plaintiff seeking to recover for alleged constitutional violations with respect to conviction, imprisonment, or other harms caused "whose unlawfulness would render a conviction or sentence invalid . . . must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck v. Humphrey,* 512 U.S. 477, 486-87 (1994). A claim for damages which is related to a conviction or sentence that has not been invalidated is not cognizable under §1983. *Id.* at 487. Thus, the *Heck* rule reinforces the principle that "civil tort actions are not appropriate vehicles for challenging the validity of criminal judgments." *Bush v. Strain,* 2004 U.S. Dist. LEXIS 9358, *7 (E.D. La. 2004).

Appendix D

Analysis

The plaintiff's claims for (1) excessive force and (2) malicious prosecution may be barred by the doctrine of *Heck v. Humphrey.* However, this court has no way of determining whether to dismiss these claims because the court has not been apprised of the outcome of the plaintiff's state court suit for resisting arrest.[2] Until this court is informed of the outcome of the state trial, it will refrain from ruling on the defendants' motion to dismiss the plaintiff's claims for excessive force or malicious prosecution.

The plaintiffs claim for failure to provide medical care is clearly not barred by the ruling in *Heck v. Humphrey.* The plaintiff's allegations regarding the lack of medical attention he received while detained are unrelated to the resolution of his state law charges of resisting arrest. The alleged misconduct took place long after the arrest was completed, so success on the plaintiff's medical claim would not imply the invalidity of any pending or current convictions. Therefore, in order for this claim to be cognizable under § 1983, the plaintiff need not prove that his convictions or sentences were reversed, expunged, invalidated, or otherwise called into question. As the Supreme Court has noted, "absent some other bar to suit, a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed."

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2. The briefs indicate that the plaintiff's state court trial on charges of resisting arrest was scheduled for July 30, 2007.

Edwards v. Balisok, 520 U.S. 641, 649 (1997). This claim is immediately cognizable and has been brought in a timely manner. Therefore, this court will allow this claim to go forward without further delay.

Accordingly, the defendants' motion to dismiss (doc. 40) is **DENIED** with respect to the plaintiff's failure to provide medical care claim, and this court will withhold ruling on the plaintiff's other claims until this court is notified of the results of the plaintiff's trial in state court.

Baton Rouge, Louisiana, August 24th, 2007.

s/ James J. Brady
JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA

FILED
OCT 14 2008

No. 08-334

In The
SUPREME COURT OF THE UNITED STATES

CLAYTON ANTHONY WALKER, Individually and as Administrator of the Estate of Breanna Nicole Walker on behalf of Breanna Nicole Walker,
Petitioners,

v.

RUSS MUNSELL, Officer; DAVID HOOTER, Officer; RODNEY WALKER, Officer,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit erred when it found that the district court properly decided the motion for summary judgment filed by Defendants Russ Munsell, David Hooter and Rodney Walker, by dismissing Plaintiff's excessive force and malicious prosecution claims on the grounds that no genuine issues of material fact exist and Defendants are entitled to judgment as a matter of law. The specific issues are as follows:

   a. Whether the Fifth Circuit was correct in affirming the district court's application of *Heck v. Humphrey*[1] to Plaintiff's excessive force claim.

   b. Whether the Fifth Circuit was correct in affirming the district court's application of *Heck* to Plaintiff's particular excessive force claim wherein Plaintiff categorically denies resisting arrest in his 42 U.S.C. § 1983 action.

   c. Whether the Fifth Circuit was correct in finding that the plain language of *Heck* applied to Plaintiff even though he is habeas corpus ineligible since Plaintiff has

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[1] 512 U.S. 477 (1994).

other procedural means of establishing favorable termination under *Heck*.

2. Whether the Fifth Circuit erred when it found the district court did not abuse its discretion when it refused to certify its dismissal of Plaintiff's excessive force claim for immediate appeal under Federal Rule of Civil Procedure 54(b).

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Ruling on Motion for Rule 54(b) Certification, *Walker v. Munsell,* No. 06-867-JJB-SCR, 2007 WL 3377270 (M.D. La. Nov. 13, 2007).

The Opinion of the Fifth Circuit Court of Appeal, *Walker v. Munsell,* No. 08-30087, 281 Fed. Appx. 388 (5th Cir. June 13, 2008).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents disagree with Petitioner's statement regarding the laws involved in this matter.

Petitioner's claims for violation of his constitutional rights are brought pursuant to 42 U.S.C. § 1983. The malicious prosecution and excessive force claims dismissed on Respondents' motion for summary judgment were for alleged violations of the Fourth and Fourteenth Amendments to the United States Constitution. The

text of these constitutional provisions and statutes appear in the appendix. Supreme Court Rule 24.1(f).

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.2, Respondents state that they perceive several misstatements of fact in the petition for writ of certiorari. For the sake of brevity and clarity, Respondents discharge their obligation to the Court to point out the misstatements by presenting their own statement of facts instead of Petitioner's presentation of the facts. Supreme Court Rule 24.2.

This action involves the undisputed validity of the favorable termination requirement of *Heck v. Humphrey,* 512 U.S. 477 (1994). On July 30, 2007, Plaintiff-Petitioner Clayton Anthony Walker was convicted of three (3) counts of resisting an officer under the Code of Ordinances, City of Denham Springs (La.) § 66-293 (1987) and one (1) count of failure to signal. The convictions arose out of Plaintiff's arrest by Defendants on November 3, 2006 while Defendants were uniformed and on duty with the City of Denham Springs Police Department.

Without previously obtaining favorable termination of his criminal convictions[2], Plaintiff

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[2] Plaintiff has appealed his convictions but has been unable to obtain favorable termination.

filed this § 1983 action alleging causes of action for violation of civil rights under 42 U.S.C. § 1983, including unreasonable search and seizure and excessive force; deprivation of his Fifth and/or Fourteenth Amendment right to be free from malicious prosecution; deprivation of his Eighth Amendment right to be free from cruel and unusual punishment; and failure to provide medical care.[3]

Despite the Plaintiff's conviction of resisting arrest in the criminal suit, in the current lawsuit, Plaintiff repeatedly asserts in complaint[4], affidavit[5],

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[3] Plaintiff's 8th Amendment claim for alleged deliberate indifference to plaintiff's medical needs was dismissed on summary judgment on July 24, 2007. Plaintiff did not contest this ruling on appeal. Additionally, plaintiff voluntarily dismissed his failure to provide medical care claim after the district court denied Rule 54(b) certification of its ruling on plaintiff's excessive force claim.

[4] See Complaint for Damages at 4, *Walker v. Munsell*, No. 06-867 (M.D. La. Nov. 13, 2006). Plaintiff alleges: "Mr. Walker was on the ground with his hand behind his back, when another officer arrived moved his arms and instructed Mr. Walker to stop resisting arrest. Mr. Walker responded that he was not so doing."

[5] See Affidavit of Walker attached to Memorandum in Support of Motion Memorandum in Support of Motion to Take Deposition from Officer Russ Munsell, Officer David Hooter, Officer Rodney Walker, Officer Gerald Parker, Officer John Albritton, *Walker v. Munsell*, No. 06-867 (M.D. La. Jan. 15 2007). Plaintiff attested under oath:

> Someone grabbed both of my arms over my elbows at the lower part of my biceps and pulled them away from

deposition[6] and trial testimony[7] that after one of the Defendants made the traffic stop on November 3,

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> my face and behind my back and then my arms were just thrown toward the front of my body. I was still face down. Someone said something very close to 'quit resisting arrest.' I said, 'I'm not resisting arrest' and I moved my left and right arms and hands back to the lower part of my back.

[6] Walker dep. 50:5-9; 536-16; 57:5-9; 57:19-22, Apr. 11, 2007. On deposition, Plaintiff testified:

> Q: Did you at any time resist when this officer tried to turn you over?
> A: No, ma'am.
> ***
> Q: Okay, you may be seated. So, you told us – you told us that someone said quit resisting arrest?
> A: Yes, ma'am.
> Q: And so what did you say at that point?
> A: I said I wasn't resisting. I placed my hands back behind my lower back.
> Q: Do you know why they told you to quit resisting arrest?
> A: No ma'am.
> ***
> Q: Do you remember running at all that night?
> A: No, ma'am.
> Q: You don't remember running at all?
> A: No, ma'am.
> ***
> Q: Do you recall running at all that evening?
> A: No ma'am.

[7] See Certified Transcript of Criminal Trial Proceedings at 95-97, *City of Denham Springs v. Walker*, No. 221366 (July 30, 2007). Plaintiff testified:

2006, he attacked Plaintiff for no reason but Plaintiff did not resist any of the Defendants or their attempts to apprehend him during his arrest.

Q: Okay. What happened once the car stops; did you get out of the car?

A: Yes, ma'am, I waited for a minute, opened my door and got out. I was – that's when Officer – now that I know the officer, it was Officer Munsell was approaching the car, asked me for my license and registration.

Q: Okay. So what did you do then?

A: Leaned back in the car to get it.

Q: What happened after that?

A: I was struck from behind.

Q: What do you recall after being struck from behind?

A: Basically I – I remember hitting the ground. After that everything went – just became a blur because it – I was in shock. I was – I really couldn't place what was happening.

***

Q: Okay. Did you run?

A: No, ma'am, I don't believe I did.

Q: The officer says as soon as he stopped, you got out of the car and started running.

A: No, ma'am, I don't recall myself running.

Q: Okay. What – at what point do you recall what was going on; I mean, are you kicked, punched, or anything happen [sic] like that?

A: I remember being kicked in the side of the head and the right side of my hip, my face. Basically all over. It was just – I just felt like I was just getting beat on. Like I said, I started to hyperventilate, I blacked out after being sprayed. I wasn't able to see anything. My breathing was very hard.

Pursuant to *Heck*, a plaintiff convicted of a crime cannot recover damages for violation of his constitutional rights if that "violation arose from the same facts attendant to the charge for which he was convicted, unless he proves 'that his conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.' " *Ballard v. Burton*, 444 F.3d 391, 396 (5th Cir. 2006) (quoting *Heck*, 512 U.S. 477 at 486-487).

Plaintiff has no evidence that his convictions have been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. See, *Heck*, 512 U.S. 477 at 486 - 487.

On October 1, 2007, the district court for the Middle District of Louisiana granted summary judgment in Defendants' favor dismissing Plaintiff's claims for excessive force and malicious prosecution "under the plain language of *Heck*."[8] *Heck* applied to Plaintiff even though he is habeas ineligible because "there is nothing precluding a direct appeal

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[8] *Walker v. Munsell*, No. 06-867-JJB-SCR, 2007 WL 3377202, at * 3 (M.D. La. Oct. 1, 2007); App. C Pet. Cert. 15a-15b.

of state court convictions, and a successful appeal would clearly satisfy the favorable termination requirements under *Heck*."[9]

Plaintiff sought immediate appeal of the portion of the district court's ruling that dismissed with prejudice Plaintiff's claim for excessive force.[10] However on November 13, 2007, the district court denied Federal Rule of Civil Procedure 54(b) certification finding the Plaintiff failed to demonstrate that certification under Rule 54(b) was appropriate.[11]

The Fifth Circuit Court of Appeal properly affirmed the district court's dismissal of Plaintiff's excessive force and malicious prosecution claims which squarely challenged Plaintiff's underlying convictions pursuant to *Heck* and its progeny, by: (1) affirming the finding that the *Heck* bar to suit is not waived by failure to plead it as an affirmative defense; (2) affirming *Heck's* application to Plaintiff's excessive force claim where Plaintiff claims he did nothing wrong; (3) affirming *Heck's* application to

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[9] *Walker v. Munsell*, No. 06-867-JJB-SCR, 2007 WL 3377202, at * 4 n. 8 (M.D. La. Oct. 1, 2007) ; App. C Pet. Cert. 22a.

[10] Ruling on Motion to Dismiss, *Walker v. Munsell*, No. 06-867-JJB-SCR (M.D. La. Aug. 24, 2007); App. D Pet. Cert. 24a-27a.

[11] *Walker v. Munsell*, No. 06-867-JJB-SCR, 2007 WL 3377270, at * 1 (M.D. La. Nov. 13, 2007); App. A Opp'n. Pet. Cert. App. 1-2.

non-custodial plaintiffs; (4) affirming the district court's ruling denying Rule 54(b) certification on Plaintiff's excessive force claim.[12] Plaintiff now petitions this Court for writ of certiorari raising the same issues he raised in his appeal to the Fifth Circuit.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

Plaintiff presents no compelling reasons to review this case on a writ of certiorari. Sup. Ct. Rule 10. A petition for a writ must demonstrate that:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state

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[12] *Walker v. Munsell*, No. 08-30087, 281 Fed. Appx. 388, 389-390 (5th Cir. June 13, 2008).

> court of last resort or of a United States court of appeals;
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. Rule 10. No Rule 10 criterion is satisfied here.

While there may be a split in the circuits over the application of *Heck*'s favorable termination requirement to a habeas ineligible plaintiff, resolution of that issue is unnecessary in this case because this Plaintiff has other procedural means of establishing favorable termination. The core holding of *Heck* provides several means for a plaintiff to demonstrate invalidity of his sentence or conviction besides the issuance of a writ of habeas corpus. Favorable termination may be satisfied by showing the conviction or sentence has been: (1) reversed on direct appeal; (2) expunged by executive order; (3) declared invalid by a state tribunal authorized to make such determination; (4) or called into question by a federal court's issuance of a writ of habeas corpus. *Heck,* 512 U.S. 477, 486-477. Since Plaintiff is able to directly appeal his conviction, this Court does not have to decide whether *Heck's* favorable termination requirement should be relaxed for a plaintiff who has no procedural vehicle to challenge

his conviction. *See Vickers v. Donahue*, 137 Fed. Appx. 285 (11th Cir. 2005); *Baker v. City of Hollywood,* No. 08-60294-CIV, 2008 WL 2474665 (S.D. Fla. June 17, 2008); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000); *Battle v. Marquardt,* No. CV. A. 03-1062, 2006 WL 1073068, at *2 (W.D. Pa. Apr. 21, 2006); *Hassler v. Carson County*, 111 Fed. Appx. 728 , at * 1 (5th Cir. 2004).

In addition, there is no conflict in the circuits regarding the Fifth Circuit's application of *Heck* to an excessive force claim when Plaintiff claims he has been attacked for no reason at all. *Arnold v. Town of Slaughter,* 100 Fed. Appx. 321, at * 3 (5th Cir. 2004); *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 657 (5th Cir. 2007).

The other Rule 10 criteria are also absent. Plaintiff asserts erroneous factual findings and/or misapplication of rules of law, circumstances under which a petition for writ of certiorari is rarely granted. Sup. Ct. Rule 10. The Louisiana Supreme Court did not decide an important federal question, let alone decide it in a way that conflicts with the rulings of the high court of any other state or any United States court of appeals. There is no important question of federal law for this Court to settle. The Rule 10 criteria have not been established here.

ARGUMENT

I. Summary of Argument

The Fifth Circuit correctly affirmed the summary judgment dismissing with prejudice the excessive force and malicious prosecution claims brought against Russ Munsell, David Hooter, and Rodney Walker "until *Heck* conditions are satisfied" for the reasons discussed below:

A. The *Heck* Doctrine Was Not Waived

The lower courts correctly found the *Heck* bar to suit is not waived if omitted from an answer and can be raised by motion at trial. *Watson v. New Orleans City*, 275 F.3d 46, 2001 WL 1268716, at *3 (5th Cir. Oct. 16, 2001) (*Heck* doctrine not waived if not plead as an affirmative defense and instead raised in motion for judgment as a matter of law). Even if *Heck* were found to be an affirmative defense, (which is denied), as long as an affirmative defense is "raised in the trial court in a manner that does not result in unfair surprise . . . technical failure to comply precisely with Rule 8(c) is not fatal" and in such a situation a court may hold that the defense was not waived. *Lucas v. United States*, 807 F.2d 414, 417 (5th Cir. 1986); *Allied Chemical Corp. v. Mackay*, 695 F.2d 854, 855-856 (5th Cir. 1983); *United States v. Shanbaum*, 10 F.3d 305, 312 (5th

Cir. 1994). Plaintiff does not argue that he was prejudiced by Defendants' not raising *Heck* in their answer. Therefore, the lower courts did not err in finding *Heck* was properly raised by motion and not waived, especially since "waivers of defenses based on grounds rooted in considerations of state sovereignty are applied less harshly than other waivers." *See Graham v. Johnson*, 94 F.3d 958, 970 (5th Cir. 1996) (*per curiam*).

B. *Heck* Applies to Excessive Force Claims Where Plaintiff Categorically Denies Resistance

Plaintiff's excessive force claim which is based solely on his assertion that he did not resist arrest and did nothing wrong "squarely challenges the factual determination that underlies his conviction for resisting an officer" and was properly dismissed by the lower courts. *Arnold v. Town of Slaughter*, 100 Fed. Appx. 321, 324 (5th Cir. 2004). This particular type of excessive force claim falls within the category of excessive force claims that are barred by the Fifth Circuit. *Id.*; *see also DeLeon v. City of Corpus Christi*, 488 F.3d 649, 656-57 (5th Cir. 2007).

C. The Plain Language of *Heck* Applies to Plaintiff Even Though He Is Habeas Ineligible

The lower courts properly dismissed with prejudice Plaintiff's excessive force and malicious prosecution claims pursuant to the plain language of *Heck*. Even though Plaintiff was not in custody when he filed his § 1983 action, *Heck's* favorable termination requirement applies to Plaintiff because he has other procedural means of establishing favorable termination. *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000). The mere unavailability of the federal writ of habeas corpus does not affect *Heck's* applicability as long as, like in this case, Plaintiff has other remedies available to call into question his sentence. *Battle v. Marquardt*, No. CV. A. 03-1062, 2006 WL 1073068, at *2 (W.D. Pa. Apr. 21, 2006). Therefore this case is not the appropriate case to decide the split in the circuits regarding whether *Heck* applies to a habeas ineligible plaintiff.

D. The District Court Properly Exercised its Discretion in Denying Rule 54(b) Certification

The Fifth Circuit properly found the district court did not abuse its direction in refusing to certify under Fed. R. Civ. P. 54(b) the dismissal of Plaintiff's excessive force claim. Rule 54(b) certification is warranted only upon the district court's "express determination that there is no just reason for delay

and upon an express direction for entry of judgment." Fed. R. Civ. P. 54(b). Here the inconvenience of piecemeal appeals far outweighed the possibility of delaying Plaintiff's appeal of the district court's dismissal of his excessive force claim. Therefore, the Fifth Circuit properly affirmed the district court's exercise of discretion.

II. The Fifth Circuit Properly Found Summary Judgment Was Warranted

A. *Heck v. Humphrey* Standard

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the majority of the Supreme Court held a § 1983 claim that would impugn a state conviction or sentence "is not cognizable" until the conviction or sentence has been invalidated:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination or called into question by a federal court's issuance of a writ of habeas corpus . . . .

Heck, 512 U.S. at 486-87. This requirement has become known as the "favorable termination" requirement. *Sappington v. Bartree,* 195 F.3d 234, 235 (5th Cir. 1999). Justice Scalia, joined by four other Justices, grounded his opinion on a comparison to the common law, rather than the need to preserve habeas corpus as the exclusive federal remedy. The Court analogized plaintiff's damages action and similar actions that challenge the lawfulness of a conviction or confinement, to common law tort actions for malicious prosecution. Since a successful malicious prosecution claim requires the accused to first obtain a favorable judgment in the criminal prosecution, the Court concluded the same "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Heck*, 512 U.S. at 486.

B. The Fifth Circuit Properly Found the *Heck* Doctrine Was Not Waived

Plaintiff cites the residual clause of Fed. R. Civ. P. 8(c) in contending that the Defendants waived the *Heck* bar to suit. Rule 8(c) requires a party to "set forth affirmatively . . . . res judicata, ... and any other matter constituting an avoidance or affirmative defense." Fed. Rule Civ. P. 8(c). However, as recognized by the district court, the residual clause of Rule 8(c) has not been extended to

explicitly cover the *Heck* doctrine. *Quintana v. Gates*, No. CV 0007166 GAF, 2004 WL 1661540, at * 4 (C.D. Cal. July 20, 2004). Agreeing that *Heck* is more akin to a jurisdictional barrier that can be raised by a motion pursuant to Rule 12(b), the district court properly overruled Plaintiff's objection to the use of the *Heck* doctrine. *Quintana*, 2004 WL 1661540, at * 5.

Even if *Heck's* bar to suit is an affirmative defense (which is denied), the lower courts properly found the Defendants did not waive *Heck* by not raising it in their answer. *Watson v. New Orleans City*, No. 00-30438, 275 F.3d 46, 2001 WL 1268716 *3 (5th Cir. Oct. 16, 2001) (*Heck* bar to suit not waived if not plead as an affirmative defense and instead raised in motion for judgment as a matter of law). "The waiver rule is not applied automatically and as a practical matter there are numerous exceptions to it. [One is that] the substance of many unpleaded affirmative defenses may be asserted by pretrial motions, particularly in the absence of prejudice." Charles Alan Wright & Arthur R. Miller, 5 *Federal Practice and Procedure* § 1278 at 491-94 (3d ed. 1990); *accord Phyfer v. San Gabriel Dev. Corp.*, 884 F.2d 235, 241 (5th Cir. 1989).

Where an affirmative defense "is raised in the trial court in a manner that does not result in unfair surprise; however, technical failure to comply precisely with Rule 8(c) is not fatal." *Jones v. Miles*, 656 F.2d 103, 107 n. 7 (5th Cir. 1981). There was no

surprise here and Plaintiff was not prejudiced in his ability to respond. Although Defendants did not raise *Heck* in their answer on January 9, 2007, the *Heck* doctrine was raised at a pragmatically sufficient time when Defendants included *Heck* in their motion to dismiss without prejudice and alternative motion to stay proceeding pending resolution of criminal proceeding filed on May 25, 2007. Defendants did not "lie behind the log." *See Bettes v. Stonewall Ins. Co.*, 480 F.2d 92, 94 (5th Cir. 1973). Thus construing the Federal Rule of Civil Procedure to do substantial justice, the lower courts properly found the *Heck* defense was not waived.

C. The Fifth Circuit Correctly Found *Heck* Bars This Particular Excessive Force Claim Wherein Plaintiff Categorically Denies Resisting Arrest in His § 1983 Action

The lower courts properly found *Heck*, 512 U.S. at 486-87, applied to Plaintiff's particular excessive force claim where Plaintiff alleged he did nothing wrong but was viciously attacked for no reason. *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003) (As "master of his ground," if a plaintiff makes allegations that are inconsistent with his valid convictions, " *Heck* kicks in and bars his civil suit."). The Fifth Circuit in *Arnold v. Town of Slaughter*, 100 Fed. Appx. 321 (5th Cir. 2004), found that in those cases wherein the plaintiff categorically denies resisting arrest, the plaintiff's suit cannot

survive *Heck's* bar because the suit "squarely challenges the factual determination that underlies his conviction for resisting an officer." *Id.* at 324-325.

1. *Arnold* and Its Progeny

In *Arnold,* plaintiff claimed he did nothing to provoke the officer's actions, never attempted to strike the officers, never threatened any of them, or resisted their attempts to arrest him. *Arnold,* 100 Fed. Appx. at 324. However in the criminal case, the trial judge had made a specific finding that plaintiff had resisted the officer by being hostile and threatening and by initiating the confrontation. *Id.* at 324. The court found plaintiff's challenge "distinguishable from excessive force claims that survive *Heck's* bar." *Id.* at 324. The court found this distinction because:

> Arnold's claims are not that police used excessive force after he stopped resisting arrest or even that officers used excessive and unreasonable force to stop his resistance. Instead, Arnold claims that he did nothing wrong, but was viciously attacked for no reason. In this way, Arnold's claims are distinguishable from excessive force claims that survive *Heck's* bar. Arnold's suit squarely challenges the factual determination that underlies his conviction for resisting an officer. If Arnold prevails, he will have

> established that his criminal conviction lacks any basis.

Id. at 324. Following *Arnold,* in *DeLeon v. City of Corpus Christi,* the court found *Heck* barred plaintiff's excessive force claim that was not separable from his aggravated assault conviction because the complaint presented the excessive force claim as single violent encounter throughout which the plaintiff was wholly innocent. *DeLeon,* 488 F.3d 649, 656-57 (5th Cir. 2007); *see also Johnson v. Dallas City Police Dept.,* 2004 WL 2964968 (N.D. Tex. Dec. 15, 2004), *aff'd,* 2005 WL 119467 (N.D. Tex. Jan. 18, 2005) (plaintiff's excessive force claim in which he alleged he did nothing wrong, but was viciously attacked for no reason while in handcuffs was barred by *Heck* because the facts if proved would squarely challenge the factual determinations of his conviction for aggravated assault); *Okoro,* 324 F.3d 488, 490 (7th Cir. 2003) (*Heck* barred plaintiff's claim that police officers stole gems and cash from plaintiff in the course of an arrest on drug trafficking charges where plaintiff "adhered steadfastly to his position" that he was innocent of any wrongdoing); *Beverly v. Talsma,* No. 3:06-CV-0160-DFH-WGH, 2008 WL 2114886, at * 5 (S.D. Ind. Mar. 28, 2008) (summary judgment granted dismissing plaintiff's claims as barred by *Heck* where plaintiff alleged he "was in no way, shape, or form, a threat" to the officer).

2. Plaintiff's Claims are Like *Arnold* and Its Progeny

Plaintiff here claims that he did nothing wrong, did not resist and was viciously attacked for no good reason.

However, Plaintiff was convicted of three (3) counts of resisting an officer under Section 66-293 of the Denham Springs Code and one count of failure to use a turning signal.[13] [14] The judge in the criminal

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[13] City Court of Denham Springs Court Minutes, *City of Denham Springs v. Walker*, No. 221366 (July 13, 2007).

[14] Code of Ordinances, City of Denham Springs (La.) § 66-293 (1987) which mirrors La. R.S 14:108, defines resisting an officer to encompass:

> (a) Resisting an officer is the intentional inference with, opposition or resistance to, or obstruction of an individual action in his official capacity and authorized by law to make a lawful arrest or seizure of property to serve any lawful process of court order when the offender knows or has reason to know that the person arresting, seizing property or serving process is acting in his official capacity. [Emphasis added].

The phrase 'obstruction of' as used in this section shall, in addition to its common meaning, signification, and the connotation mean the following:

(1) Flight by one sought to be arrested before the arresting officer can restrain him and after notice is given that he is under arrest.

(2) Any violence toward or any resistance or opposition to the arresting officer after the arrested party is actually placed under arrest and before he is incarcerated in jail.

court found the Plaintiff resisted the officer:(1) "when he initially ran"; (2) when he was captured, he continued to actively resist"; and (3) when he resisted as "Corporal Walker attempted to cuff him."[15]

Despite the state court's findings, in his sworn deposition and trial testimony Plaintiff maintains that he remembers doing nothing wrong and that the officers just attacked him.[16] Plaintiff's denial of excessive force was the same argument the court found distinguished Arnold's excessive force claim from those that survive *Heck's* bar.

Under La. R.S. 14:108, resisting an officer is defined as:

> Resisting an officer is the intentional interference with, opposition or resistance to, or obstruction of an individual acting in his official capacity and authorized by law to make a lawful arrest, lawful detention, or seizure of property or to serve any lawful process or court order when the offender knows or has reason to know that the person arresting, detaining, seizing property, or serving process is acting in his official capacity. [Emphasis added].

[15] Certified Transcript at 16, *City of Denham Springs v. Walker*, No. 221366, (July 30 2007).

[16] *See supra* text accompanying notes 4-7.

3. Plaintiff's Excessive Force Claim is Distinguishable From Claims That Survive *Heck's* Bar

Plaintiff's excessive force claim is distinguishable from excessive force claims that survive *Heck's* bar. His claim differs from *Dyer v. Lee*, 488 F.3d 876 (11th Cir. 2007), which involved allegations of excessive force occurring **after** the plaintiff had been placed in lawful custody for resisting arrest. Plaintiff's excessive force claim is also distinguishable from *VanGilder v. Baker*, 435 F.3d 689, 691 (7th Cir. 2006), where *Heck* did not bar a claim of excessive force where plaintiff did not deny his resistance or challenge the factual basis for the conviction.

As Plaintiff's cases illustrate, a § 1983 claim would not necessarily imply the invalidity of a resisting arrest conviction, and therefore would not be barred by *Heck*, if the factual basis for the conviction is temporally and conceptually distinct from the excessive force claim. However, Plaintiff's complaint does not allege that his excessive force claim is separable from the events underlying his resisting arrest conviction. In contrast, Plaintiff's suit squarely challenges the state court judge's factual determinations upon which his conviction of resisting an officer is based. If Plaintiff prevails, he will have established that his criminal conviction lacks any basis. Therefore, the lower court properly

found this lawsuit challenges the validity of Plaintiff's conviction and is barred by *Heck*.

This case is also distinguishable from cases that find an excessive force claim would not necessarily imply the invalidity of a resisting arrest conviction where lawfulness of the arrest is not an essential element of the crime. *See Robinson v. Doe*, 272 F.3d 921, 923 (7th Cir. 2001) (Robinson's excessive force claim was not barred by *Heck* because, under Illinois law, "[p]olice might well use excessive force in effecting a perfectly lawful arrest"); *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1125 (10th Cir. 1999) (Martinez was allowed to proceed with a § 1983 claim under New Mexico law "to the extent . . . . [it] d[id] not challenge the lawfulness of his arrest"); *Nelson v. Jashurek*, 109 F.3d 142, 145 (3d Cir. 1997) (Nelson was allowed to proceed on a § 1983 claim, despite having an outstanding conviction for resisting Jashureck's arrest, because in Pennsylvania "a finding that Jashurek used excessive 'substantial force' would not imply that the arrest was unlawful . . . ."); *Willingham v. Loughnan*, 261 F.3d 1178, 1183 (11th Cir. 2001), *cert. granted and judgment vacated on other grounds*, 537 U.S. 801 (2002) (same).

Under Louisiana law, a conviction for resisting arrest is incompatible with an allegation that the arrest was unlawful. An essential element of the crime of resisting arrest is a lawful arrest. Code of Ordinances, City of Denham Springs (La.)

66-293 (1987)[17]; *see also Arnold,* 100 Fed. Appx. at 325. Moreover, an officer making a lawful arrest, "may use reasonable force to arrest and detain a person and to overcome any resistance or threatened resistance of the person being arrested or detained." La. Code Crim. Proc. Ann. art. 220 (2008). This aspect of Louisiana's law distinguishes the instant case from those regarded by the Plaintiff as conflicting with the decisions of lower courts.

D. The Fifth Circuit Properly Found the Plain Language of *Heck* Applies to Plaintiff Even Though He Is Habeas Ineligible Since Plaintiff Has Other Procedural Means of Establishing Favorable Termination.

The lower court properly found *Heck* precludes Plaintiff's claims even though he is habeas ineligible because as the district court pointed out "there is nothing precluding a direct appeal of the state court convictions, and a successful appeal would clearly satisfy the favorable termination requirements under *Heck." Walker v. Munsell,* No. 06-867-JJB-SCR, 2007 WL 3377202, at * 4 n. 8 (M.D. La. Oct. 1, 2007); App. C to Petitioner's Pet. Cert. 22a.

While there may be a split in the circuits regarding whether *Heck* applies to a habeas

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[17] *See supra* note 14.

ineligible plaintiff, resolution of that issue is unnecessary to the outcome of this case because Plaintiff has other procedural means of challenging his conviction. *See Vickers v. Donahue,* 137 Fed. Appx. 285 (11th Cir. 2005) (declining to decide the issue because the plaintiff was not without remedy to seek relief from his sentence of imprisonment, as he could have appealed the order imposing that sentence); *Baker v. City of Hollywood,* No. 08-60294-CIV, 2008 WL 2474665 (S.D. Fla. June 17, 2008) (even though a habeas corpus action was unavailable to the plaintiff, the court did not have to decide whether there was an exception to *Heck* because plaintiff was not without an avenue to seek relief from his conviction).

The plain language of *Heck* provides several means by which a plaintiff may satisfy the favorable termination requirement. The favorable termination requirement may be satisfied by showing that the conviction or sentence has been: (1) reversed on direct appeal; (2) expunged by executive order, (3) declared invalid by a state tribunal authorized to make such determination, (4) or called into question by a federal court's issuance of a writ of habeas corpus. *Heck,* 512 U.S. 477, 486-87. Thus the mere unavailability of the federal writ of habeas corpus (which is merely one of the four methodologies listed in *Heck*) does not affect *Heck's* applicability as long as, like in this case, plaintiff has another state law remedy available to call into question the conviction/sentence. *Battle v. Marquardt,* No. CV. A.

03-1062, 2006 WL 1073068, at *2 (W.D. Pa. April 21, 2006).

In *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000), the Fifth Circuit applied *Heck's* "favorable termination" requirement to a non-custodial plaintiff's § 1983 complaint that challenged his extended sentence because the plaintiff failed to show other "procedural vehicles" were lacking.[18] Likewise in *Hassler v. Carson County*, 111 Fed. Appx. 728, at * 1 (5th Cir. 2004), the court found the *Heck* doctrine applied to a former prisoner who was habeas ineligible because the prisoner failed to show other "procedural vehicle[s]" were lacking. Here as the district court correctly recognized "there is nothing precluding a direct appeal of the state court convictions, and a successful appeal would clearly satisfy the favorable termination requirements under *Heck*." *Walker v. Munsell*, No. 06-867-JJB-SCR, 2007 WL 3377202, at * 4 n. 8 (M.D. La. Oct. 1, 2007); App. C to Petitioner's Pet. Cert. 22a.

Plaintiff misconstrues *Heck*, 512 U.S. 477, by disregarding the existence of post-custody state-law

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[18] Recognizing the concurring and dissenting opinions in *Spencer v. Kemna*, 523 U.S. 1 (1998), would relax *Heck's* universal favorable termination requirement for plaintiffs who have no procedural vehicle to challenge their conviction. The *Randell* court found no need to relax the *Heck* doctrine since Randell had not shown that such a procedural vehicle is lacking; he spoke only of inability to obtain habeas relief. *Id.* at 301.

remedies. Although Justice Souter recognized there are no federal judicial remedies for a person wrongly convicted in state court who is no longer in custody, there are such remedies in state law. The *Heck* majority responded to Justice Souter's concurrence by noting that the favorable termination requirement is "not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 410 n. 10. The *Heck* majority admits that § 1983 will not provide a remedy in all cases. *Id.* Thus, in responding to Justice Souter, the *Heck* majority simply made clear that a released prisoner must demonstrate, by some appropriate means, that his conviction has been invalidated prior to the institution of his § 1983 damages action.

Furthermore, a federal forum is also not required to satisfy the favorable termination requirement. In *Withrow v. Williams*, Justice Scalia attacked the theory that "a federal forum must be afforded for every federal claim of a state criminal defendant." *Withrow*, 507 U.S. 680, 721 (1993) (Scalia, J., concurring). Such a notion is contrary to the very structure of the federal judiciary:

> It would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower federal courts (as our Constitution does not). And it would be an unworkable constitution that requires redetermination in

> federal courts of all issues of pervasive federal constitutional law that arise in state-court litigation.

Id. at 721. For these reasons the lower courts properly applied *Heck*'s bar to Plaintiff despite his inability to obtain habeas relief.

III. The District Court Did Not Abuse Its Discretion When It Refused To Certify Its Dismissal of Plaintiff's Excessive Force Claim For Immediate Appeal Under Federal Rule Of Civil Procedure 54(b)

The lower courts properly found immediate appeal of the portion of the district court's ruling dismissing plaintiff's excessive force claim did not warrant the use of the court's discretionary power under Fed. R. Civ. P. 54(b) to provide a remedy in the "infrequent harsh case." Notes of the Advisory Committee on Fed. R. Civ. P. 54 concerning 1946 amendments; *Jasmin v. Dumas*, 726 F.2d 242, 244 (5th Cir. 1984).

Rule 54(b) certification is warranted only upon the district court's "express determination that there is no just reason for delay and upon an express direction for entry of judgment." Fed. R. Civ. P. 54(b). The court weighs "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Road Sprinkler Fitters Local Union v. Continental*

Sprinkler Co., 967 F.2d 145, 148 (5th Cir. 1992) quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). This analysis also considers whether the claims under review are separable from those that were not decided by the district court and whether the nature of claims decided are such that the same issues will not have to be decided again in the event of a subsequent appeal. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980).

In this case the inconvenience of piecemeal appeals far outweighed the possibility of delaying Plaintiff's appeal of the district court's dismissal of his excessive force claim. Immediate appeal of Plaintiff's excessive force claim would have been an inefficient use of judicial sources and required Defendants to incur unnecessary duplicative expenses. Thus, the district court's denial of Plaintiff's motion to certify was within the court's discretion under Fed. R. Civ. P. 54(b), and the Fifth Circuit correctly affirmed that decision.

In addition, any argument that the district court erred by dismissing the excessive force claim with prejudice "until *Heck* conditions are satisfied" is unavailing because Plaintiff has failed to show his conviction has been invalidated or called into question. *See Heck v. Humphrey*, 512 U.S. 477 (1994); *Boyd v. Biggers*, 31 F.3d 279, 283 (5th Cir. 1994); *Stephenson v. Reno*, 28 F.3d 26, 27 (5th Cir.1994); *Johnson v. McElveen*, 101 F.3d 423 (5th

Cir. 1996); *DeLeon v. City of Corpus Christi*, 488 F.3d 649 (5th Cir. 2007). In *Boyd v. Biggers*, 31 F.3d 279, 284 (5th Cir.1994), the court squarely held that it was not error to dismiss a complaint pursuant to *Heck* with prejudice. A plaintiff's claim is dismissed with prejudice under *Heck* because he has not satisfied the *Heck* requirements and he has no cause of action on his damage claims. *Johnson v. McElveen*, 101 F.3d 423, 424 (5th Cir. 1996).

Additionally, the Supreme Court's recent decision in *Wallace v. Kato*, 127 S. Ct. 1091 (2007), has no effect on the district court's dismissal of this case. In *Wallace*, the Court made clear that *Heck* does not bar "an action which would impugn an anticipated future conviction . . . ." *Id.* at 1097 [Emphasis added]. In fact the *Wallace* Court specifically held: "If the plaintiff is ultimately convicted, and if the civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit." *Wallace*, 127 S. Ct. at 1098. Since Plaintiff has been convicted, and his conviction squarely challenges his conviction the lower courts correctly dismissed Plaintiff's claims as barred by *Heck*. *Heck*, 512 U.S. 477 (1994).[19]

CONCLUSION

The district court's judgment dismissing Petitioner's excessive force and malicious prosecution claims were properly affirmed by the Fifth Circuit. Additionally, the Fifth Circuit correctly found that the district court did not abuse its discretion in declining to certify its dismissal of Petitioner's excessive force claim for immediate appeal under Federal Rule of Civil Procedure 54(b).

Because the Petitioner fails to show compelling reasons for this Court's review of the Fifth Circuit's ruling, the Petitioner's writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A· RULING ON MOTION FOR RULE 54(B) CERTIFICATION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED NOVEMBER 13, 2007

United States District Court, M.D. Louisiana.

Clayton Anthony WALKER, et al.
v.
Officer Russ MUNSELL, et al.
Civil Action No. 06-867-JJB-SCR.

Nov. 13, 2007.

Donna Unkel Grodner, Charlotte McDaniel McGehee, Grodner and Associates, APLC, Baton Rouge, LA, for Plaintiffs.
Bradley C. Myers, Katie L. Deranger, Lana Davis Crump, Kean, Miller, Hawthorne, D'Armond, Baton Rouge, LA, for Defendants.

RULING ON MOTION FOR RULE 54(b) CERTIFICATION

JAMES J. BRADY, District Judge.
*1 Before the court is a motion by plaintiff for certification (doc. 82) under Fed. Rule Civ. P. 54(b). The motion is opposed (doc. 85). There is no need for oral argument.

When multiple claims and parties are involved, the court "may direct the entry of judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay."Fed. Rule Civ. P. 54(b). While application of the rule is discretionary, there is "an historic federal policy against piecemeal appeals."*H & W Industries, Inc. v. Formosa Plastics Corp., USA,* 860 F.2d 172, 175 (5th Cir.1988). For that reason, district courts have been instructed to use the procedure sparingly rather than routinely. *Jasmin v. Dumas,* 726 F.2d 242, 244 (5th Cir.1984).

In this case, plaintiff has failed to demonstrated that certification under Rule 54(b) would be appropriate.

Accordingly, the motion for certification under Rule 54(b) (doc. 82) is hereby DENIED.

M.D.La.,2007.
Walker v. Munsell
Slip Copy, 2007 WL 3377270 (M.D. La.)

APPENDIX B- 42 U.S.C. § 1983

Petitioner's claims for violation of his constitutional rights is brought pursuant to 42 U.S.C. § 1983. Section 1983 provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX C- U.S. CONST. AMENDMENTS IV AND XIV

The claims of the Petitioner which were dismissed on Respondents' motion for summary judgment were for alleged violations of the Fourth and Fourteenth Amendments to the United States Constitution. The relevant constitutional amendments are as follows:

Amendment IV. Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV. Citizenship; privileges and immunities; due process; equal protection; appointment of representation; disqualification of officers; public debt; enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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